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THE

NORTH CAROLINA

CRIMINAL CODE AND DIGEST.

BY
THOMAS J. JEROME,
ATTORNEY AT LAW,
MONROE, N. C.

A COMPLETE CODE OF ALL THE CRIMINAL STATUTES OF THE
STATE, INCLUDING THOSE PASSED BY THE
LEGISLATURE OF 1899;

ALSO

A COMPLETE DIGEST OF EVERY CRIMINAL CASE IN THE NORTH CAROLINA
REPORTS UP TO AND INCLUDING THE 124TH; WITH A TABLE OF CASES
DIGESTED, AND A TABLE OF CASES OVERRULED, CRITICISED,
FOLLOWED, DISTINGUISHED AND APPROVED.

(SECOND EDITION.)

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PREFACE.

The favorable reception accorded the first edition of the **NORTH CAROLINA CRIMINAL CODE AND DIGEST** by the legal profession has to some extent justified the getting out of a second edition. In this edition much care has been taken in trying to correct errors and supply omissions occurring in the first edition, the object being to make this work a complete guide to the criminal law of the state.

Owing to the fact that our criminal statutes are mixed indiscriminately throughout both volumes of *The Code* with statutes pertaining exclusively to civil matters, much difficulty has been experienced in grouping our criminal statutory law under appropriate titles. Many decisions are also of such a character that they might be very appropriately cited under different statutes, thus requiring that they be many times duplicated; but, in order to avoid duplicating the citations as far as possible, each case has been placed under the statute where it seemed most appropriate, and cross-references used as a guide which it is hoped will prove sufficient.

No forms have been given except the forms for making requisitions recommended by the **INTERSTATE EXTRADITION CONFERENCE** held in New York in 1887, which have been adopted by the governor of North Carolina as well as by most, if not all, the other states. These forms have been given for the reason that lawyers often have to act in a great hurry in securing extradition papers, and they have no time to apply for blank forms or to study the preparation of such forms. The rules to be observed in making requisitions accompany the forms.

The number of each statute as given in The Code of 1883, will be found in parenthesis opposite the number adopted in this book.

The design of this book is to make it a working tool to lighten the labors of a hard-working profession, and it is to be hoped that it will not altogether fail of its purpose.

The editor of the present edition announces with sorrow that since the publication of the first edition one of the editors of that edition, Hon. Samuel J. Pemberton, has died. He was a learned and astute lawyer, a clear and logical thinker and reasoner, and was much respected and beloved by his many friends in the legal profession throughout the state.

THOMAS J. JEROME.

MONROE, N. C., *August, 1899.*

**TABLE OF SECTIONS OF THE CODE,
WITH THE CORRESPONDING SECTIONS IN THIS
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Inasmuch as several of the volumes of Reports prior to the 63rd have been reprinted by the State with the number of the Report instead of the number of the Reporter, and still other volumes will be reprinted and numbered in like manner, it is permissible for counsel hereafter, in their option, to cite the volumes prior to the 63rd Reports, respectively, as follows :

1 and 2 Martin } Taylor & Conf. }	or	1 N. C.	9 Iredell Law	or	81 N. C.
1 Haywood	"	2 "	10 " "	"	82 "
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1 Murphey	"	5 "	13 " "	"	85 "
2 "	"	6 "	1 " Eq.	"	86 "
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THE NORTH CAROLINA CRIMINAL CODE AND DIGEST.

ABANDONMENT.

- SEC. 1. Abandonment of wife and children by husband. SEC. 2. Failure to provide support presumptive evidence.
SEC. 3. Right of custody forfeited.

Section 1 (970). Abandonment of wife and children by husband. 1868-'9, c. 209, s. 1. 1873-'4, c. 176, s. 10. 1879, c. 92. 1895, c. 504. 1893, c. 83. 1889, c. 504.

If any husband shall wilfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor.

WIFE A COMPETENT WITNESS.—The wife is a competent witness against the husband "as to the fact of abandonment or neglect to provide adequate support." Brown, 67—470.

MARRIAGE.—On indictment for abandonment, the wife is not a competent witness to prove the marriage. Brown, 67—470.

ABANDONMENT PRIOR TO RATIFICATION OF THE ACT.—Where the abandonment took place prior to the ratification of the act of 1869, the husband can not be convicted therefor. Deaton, 65—496.

FORMER CONVICTION.—A husband once convicted of an abandonment of his wife can not be again tried for the same offence, he not having lived with her since the original abandonment. Dunston, 78—418.

NEW INDICTMENT.—Where a warrant is issued against the husband more than two years after the act of abandonment, and on the trial he agrees to support his wife, and does so for two weeks though he declines to live with her, and thereafter fails to carry out his agreement, such failure constitutes a fresh abandonment, and will support a new indictment. Davis, 79—603.

STATUTE OF LIMITATIONS.—Abandonment is not a continuing offence by reason of the continued separation, and an indictment found more than two years after the separation is barred by the statute of limitations. Davis, 79—603.

DURESS—MARRIAGE.—Where the husband is under arrest at the time the marriage is solemnized by virtue of an order made in a suit by the *feme* against him for breach of promise of marriage and seduction, the marriage is not voidable as having been contracted under duress, since duress can not be predicated of compulsion to discharge a legal duty. Davis, 79—603.

SUPPORT OF CHILDREN.—The failure of a father to provide for the support of the children is as much a violation of the statute as the failure to provide support for the wife, and an indictment charging such violation is sufficient. Kirby, 110—558.

REPEALING ACT LIMITING JURISDICTION.—Chapter 83, laws of 1893, entitled "An Act to Amend Chapter 504, Laws of 1889," is not defeated in its purpose of repealing the act of 1889 by an ambiguity arising in the body of the act in the failure to specify "laws of 1889." Woolard, 119—779.

Sec. 2 (971). Abandonment, failure to provide support presumptive evidence thereof. 1868-'9, c. 209, s. 3.

If the fact of abandonment and failure to provide adequate support of wife and children shall be proved, or while being with such wife, neglect by the husband to provide for the adequate support of such wife or children, shall be proved, then the fact that such husband neglects applying himself to some honest calling for the support of himself and family, but is found sauntering about, endeavoring to maintain himself by gaming or other undue means, or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment and neglect is wilful.

Sec. 3. Abandonment, right of custody forfeited. 1885, c. 120.

In all cases where the surviving parent of any orphan child or children shall have wilfully abandoned the care, custody, nurture and maintenance of such orphan child or children to kindred, relatives or other persons, such parent shall be deemed to have forfeited all rights and privileges with respect to the care, custody and services of such child or children.

The rights and privileges of such parent may be restored by the voluntary surrender of such child or children by the person or persons in whose care and custody such child or children may be.

The rights and privileges of such parent may also be restored by order of any judge of the superior court made in the district in which such child or children may be, when it shall appear to the satisfaction of such judge that the interest and welfare of such child or children will not be materially prejudiced by such restoration. That the person or persons having the care and custody of any such child or children shall have at least ten days' notice of the time and place of the hearing of the application for such order of restoration, and shall be permitted to resist the same.

Any parent whose rights and privileges may have been forfeited by the provisions of this act, who shall procure the possession and custody of any child or children, with respect to whom his or her rights and privileges are forfeited, otherwise than as by this act is provided, shall be deemed guilty of a crime, and upon conviction shall be punished as for abduction.

ABATEMENT.

PLEA IN ABATEMENT.—A plea in abatement to an indictment for an assault pending in the superior court, that a prior indictment is pending against the defendant in the county court, is good, because the courts have concurrent jurisdiction. *Yarborough*, 8 (1 Hawks), 78.

An indictment is not defective because of the omission of an addition of the occupation of the defendant, but even if it was, a plea in abatement which commences, "and the said A. B. (the defendant), comes," etc., is itself defective, since it admits the defendant to be the person indicted. *Newmans*, 4 (2 Car. L. R.), 74 (171).

Where an erroneous judgment is rendered on a plea in abatement, the defendant may either appeal, or plead in chief, and on a second erroneous judgment assign errors upon the whole record. *Quinnery*, 1 (Tay.), 33 (25).

The court, in its discretion, may allow a defendant to withdraw a plea of not guilty and plead in abatement, but he can not claim to do so as a matter of right. *Lamon*, 10 (3 Hawks), 175.

A plea in abatement on the ground of the incompetency of one of the grand jurors put in *after* pleading to the indictment is not in apt time. *Potts*, 100—457.

A plea in abatement after plea of "not guilty" entered is only allowable at the discretion of the court. *Jones*, 88—671.

Objection to any irregularity in drawing a grand jury must be taken by plea in abatement on the arraignment, and not by motion to quash. *Martin*, 82—672.

Slight variances in the name of a defendant appearing in different parts of the record will not sustain a motion for a new trial, or to arrest judgment. The objection, if available at all, can only be made by plea in abatement. *Vestal*, 82—563.

Where a case is continued without requiring the presence of defendant in court to enter his pleas, he is entitled, on his arraignment at a subsequent term, to plead a misnomer in abatement, or to enter any other plea which was open to him at the former term. *Jackson*, 82—565.

Where, on indictment against two defendants, the case is continued at the instance of one, a plea in abatement by the other at the subsequent term is in apt time. *Watson*, 86—624.

Where, upon arraignment of one charged as a principal with the crime of arson, the record showed that by the consent of court and the defendant the indictment was changed to charge an *attempt* to burn a dwelling-house, but no other charge was made by the grand jury, and the defendant thereupon "pleaded guilty to an attempt to burn a store," and was sentenced to imprisonment in the penitentiary: *Held*, that the attempted change of the bill without a new indictment, the plea of guilty and the judgment of the court were nullities, and that an accessory after the fact could not sustain a plea in abatement alleging the acquittal of the principal felon by proof of such proceedings. *Smith*, C. J., *dissenting*. *Jones*, 101—719.

It is a general rule that where two or more offences arise out of the same transaction, a conviction or acquittal upon an indictment for one will not be good in bar of that for the other, unless the latter is a necessary ingredient of the former, and the defendant might have been convicted of it under the first indictment. *Jones*, 101—719.

NO EVIDENCE.—Where the accused establishes the fact that the bill was found without evidence or upon illegal evidence, it may be quashed or the matter pleaded in abatement. *Lanier*, 90—714.

NOL PROS.—Where two indictments for the same offence are had in different courts having jurisdiction and the court first acquiring jurisdiction enters a *nol pros*, the defendant can be tried in the court retaining jurisdiction. McNeill, 10 (3 Hawks), 183.

COURT MUST HAVE JURISDICTION.—It is only where a judgment is rendered by a court having jurisdiction that it is available as a plea in bar. Ivie, 118—1227.

ABDUCTION.

Sec. 4 (973). Abduction of children. 1879, c. 81.

Any one who shall abduct, or by any means induce any child under the age of fourteen years, who shall reside with the father, mother, uncle, aunt, brother, or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, shall be guilty of a crime, and on conviction shall be fined or imprisoned at the discretion of the court, or may be sentenced to the penitentiary for a period not exceeding fifteen years.

INDICTMENT.—An indictment for the abduction of a female of the age of fifteen years with intent to defile her, can not be supported at common law or under the statute. Sullivan, 85—506.

The indictment need not state the means by which the abduction was accomplished, nor that it was done without the consent and against the will of the father, nor that defendant was not a nearer blood relation to the child than the person from whose custody it was abducted. George, 93—567.

FATHER'S CONSENT.—It is not necessary for the state to show a want of the father's consent; if the father's consent is relied on as a defence it is the duty of the defendant to show it. Chisenhall, 106—676.

CONSENT OF CHILD.—The consent of the child to leave is no defence. Chisenhall, 106—676.

FRAUD OR FORCE NOT NECESSARY.—It is not necessary that fraud or force should be used in order to constitute the crime of abduction under our statute, but the crime is complete when the child is induced to leave home through persuasion or the exercise of such moral force as to create a willingness to leave. Chisenhall, 106—676.

Sec. 5 (974). Abduction; conspiracy. 1879, c. 81. s. 2.

Every one who shall conspire to abduct, or by any means shall induce any child under the age of fourteen years, who shall reside with any of the persons aforesaid, or at school, to leave the persons aforesaid or the school, shall be guilty of a like offence, and on conviction shall be punished as prescribed in the preceding section: *Provided*, that no one who may be a nearer blood relation to the child than the persons named in said section shall be indicted for either of said offences.

ABORTION.

SEC. 6. Felony to administer to a pregnant woman any medicine to destroy her child, or to use an instrument with the same intent.

SEC. 7. Misdemeanor to procure miscarriage.

Sec. 6 (975). Abortion, felony to administer to a woman pregnant any medicine to destroy her child, or to use an instrument with the same intent 1881, c. 351, s. 1.

Every person who shall wilfully administer to any woman either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother, shall be guilty of a felony, and imprisoned in the penitentiary for not less than one year or more than ten years, and be fined at the discretion of the court.

Sec. 7 (976). Abortion, misdemeanor to administer medicine to pregnant woman or use any instrument with intent to procure miscarriage. 1881, c. 351, s. 2.

Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, shall be guilty of a misdemeanor, and imprisoned in the jail or penitentiary for not less than one year nor more than five years, and be fined at the discretion of the court.

INDICTMENT.—An indictment charging an attempt to kill by administering a poisonous drug, and an attempt to produce an abortion by the same means, is not demurrable for a misjoinder. *Slagle*, 82—653.

It is a common law misdemeanor to administer a noxious drug with intent to produce an abortion. *Slagle*, 82—653.

ABSENCE OF DEFENDANT DURING TRIAL.

On a trial for a felony no order that may prejudice the defendant can be made in his absence. *Alman*, 64—364; *Blackwelder*, 61 (Phil.), 38; *Bray*, 67—283.

It is the right of a defendant to be present when anything is said or done that may prove prejudicial to his interests; but where no instructions were given to the jury in the absence of the defendant, he can not complain that the court, in his absence, asked the jury if they desired any further instructions. *Coley*, 114—879.

On indictment for burning a granary and stable, counsel for the prosecution, on the reassembling of the court after taking a recess for dinner, addressed the jury twenty or thirty minutes, and was immediately followed by one of the defendants' counsel, who had spoken some ten or fifteen minutes, when it was suggested that defendants who were in custody had not been brought into court. The argument was immediately suspended until defendants were brought in. Defendants' counsel were present at all stages of the trial: *Held*, that the absence of defendants under such circumstances did not prevent the court from proceeding to judgment. Paylor, 89—539.

On indictment for burning a mill, the jury delivered their verdict to the judge in his room late at night, in the presence and with the assent of defendant's counsel, but in the absence of defendant, and next day defendant moved in court for his discharge, on the ground that the verdict as given was not valid and the jury had separated: *Held*, that he was not entitled to his discharge, but that there was a mistrial, and that the verdict must be set aside and *venire de novo* awarded. Jenkins, 84—812.

VERDICT RENDERED TO CLERK IN THE ABSENCE OF DEFENDANT.—Where the verdict, on indictment for larceny, is rendered to the clerk during the recess of the court, in the absence of the defendant and without his consent, and without any instructions from the court, judgment may be arrested, or the court even, *ex mero motu*, may set the verdict aside. Epps, 76—55.

VERDICT RENDERED IN ABSENCE OF DEFENDANT.—A verdict of guilty rendered, in the absence of defendant and his counsel, to a judge at his chambers, and entered on the record next day in the absence of the jury and defendant, can not be sustained. Bray, 67—283.

PRESENCE OF DEFENDANT IN COURT DURING TRIAL.—On indictment for larceny, defendant was present during the trial until the jury were returning with their verdict when he fled, and, on being called, failed to answer. One of his counsel was present when the verdict was rendered, and made no objection to the taking of the verdict in defendant's absence: *Held*, that in indictments for felonies less than capital defendant may waive his right to be present during the progress of the trial, and that the verdict thus rendered was not void. Smith, C. J., *dissenting*. Kelly, 97—404.

The right of a prisoner charged with a capital felony to be present throughout the progress of the trial can not be waived even by himself, and it is the duty of the court to see that he is actually present at each and every step taken in the progress of the trial. Jenkins, 84—812.

Counsel for a defendant charged only with a misdemeanor can not waive his presence during the trial. Jenkins, 84—812.

PRESENCE OF PRISONER IN SUPREME COURT.—It is not necessary that a prisoner should be present in the supreme court when his case is argued and determined there, and he is not denied his constitutional right to confront his accusers and the witnesses against him because he was not so present, since no "accusers" or "witnesses" appear in the supreme court against him. Overton, 77—485.

ABUSE OF FEMALE CHILDREN.

See RAPE.

ACCESSORIES.

SEC. 8. Accessories to felonies before the fact, when, where and how tried and punished.

SEC. 9. Accessories to felonies after the fact, when, where and how tried and punished.

SEC. 10. How proceeded against when principal not attained.

SEC. 11. Accessories before the fact, how punished.

Sec. 8 (977). Accessories to felonies before the fact, when, where and how tried and punished. R. C., c. 34, s. 53. 1797, c. 485, s. 1. 1852, c. 58.

If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding, shall be guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished; and the offence of the person so counseling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony or where the principal felony is triable, although such offence may have been committed at any place within or without the limits of the state; and in case the principal felony shall have been committed within the body of any county, and the offence of counseling, procuring, or commanding shall have been committed within the body of any other county, the last-mentioned offence may be inquired of, tried, determined and punished in either of such counties: *Provided*, that no person who shall be once duly tried for any such offence, whether as an accessory before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

NO ACCESSORIES BEFORE THE FACT IN LARCENY.—There are no accessories before the fact in larceny, for not only those who aid and abet, but all who advise, counsel or procure the act to be done, are principals. If an indictment charges that A committed the theft, and B was present aiding and abetting, and the proof should be that B committed the theft and A was present aiding and abetting, there would be no variance, and a conviction would be sustained. Fox, 94—928.

There are no accessories before the fact in larceny. The distinction between grand and petit larceny has been abolished, and all felonious stealing is now reduced to the grade of petit larceny. Stroud, 95—626.

MEANING OF THE WORD "COMMAND."—The meaning of the word "command," as applied to principal and accessory is where a person having control over another, as a master over his servant, orders a thing to be done. Mann, 2 (1 Hay.), 4 (7).

NO ACCESSORIES IN MISDEMEANORS.—There are no accessories in minor offences, but whatever will make a man an accessory before the fact in felony will make him a principal in misdemeanors. Cheek, 35 (13 Ired.), 114.

That which in felony makes a person an accessory before the fact, in petit larceny makes him a principal. Barden, 12 (1 Dev.), 518.

Whoever procures a felony to be done, although it be by the instigation of a third person, is an accessory before the fact, and that which in felony makes a person an accessory before the fact, in petit larceny and misdemeanors makes him a principal. Barden, 12 (1 Dev.), 518.

PRINCIPAL MUST BE PRESENT AT THE TAKING IN LARCENY.—In an indictment for larceny one can not be convicted as a principal unless he were actually or constructively present at the taking and carrying away of the goods. His previous assent to or procurement of the caption and asportation will not make him a principal, nor will his subsequent reception of the thing stolen, or his aiding in concealing or disposing of it, have that effect. (This was an indictment at common law for the larceny of a slave.) Hardin, 19 (2 D. & B.), 407.

ACCESSORIES BEFORE THE FACT CAN NOT BE CONVICTED AS PRINCIPALS.—Two persons jointly indicted with others for burning a barn containing grain, can not be convicted as principals where the evidence shows that they were not present but were accessories before the fact. Dewey, 65—572.

MURDER COMMITTED TO CONCEAL ROBBERY.—If a prisoner procures C to commit a robbery, and C kills the deceased to conceal the robbery, the principal is guilty as accessory before the fact to the murder. Davis, 87—514.

INDICTMENT MUST AVER GUILT OF THE PRINCIPAL.—An indictment for being an accessory before the fact must aver the guilt of the principal. Davis, 87—514.

EVIDENCE OF PRINCIPAL'S GUILT.—The record of the conviction of the principal felon is admissible on the trial of the accessory, and is conclusive evidence of the conviction of the principal and *prima facie* evidence of his guilt. Chittam, 13 (2 Dev.), 49.

Where a principal and an accessory are tried separately, though on the same indictment, evidence of the conviction of the principal is not admissible on the trial of the accessory, unless judgment has been first rendered against the principal. Duncan, 28 (6 Ired.), 98.

If one person lay poison for the purpose of killing another, and a third person take it and death result, it is murder, both in the principal and accessories before the fact. Fulkerson, 61 (Phil.), 233.

ACCESSORIES—THE ACQUITTAL OF THE PRINCIPAL FELON AN ACQUITTAL OF AN ACCESSORY.—Section 8 (The Code, section 977) dispenses with the necessity of the conviction of the principal felon before an accessory before the fact can be tried and punished, but the common law rule that an *acquittal* of the principal is an acquittal of the accessory is still in force. Jones, 101—719.

ACCESSORY MAY PLEAD ACQUITTAL OF PRINCIPAL.—Although under section 8 (Code, section 977) it is not necessary that the principal should be convicted before an accessory can be tried and punished, still the common law rule that an *acquittal* of the principal is an acquittal of the accessory is yet in force, and an accessory, in order to sustain a plea of

the acquittal of his principal, must show that the principal was acquitted of the same offence with which the accessory is charged. Therefore, where an indictment for arson was changed "to charge an attempt to burn a dwelling-house," and the principal defendant pleaded guilty of "an attempt to burn a store," it was held that the attempted change of the bill and the plea of guilty were nullities, and that the accessory could not sustain a plea of former acquittal of the principal by proof of such proceedings. *Smith, C. J., dissenting. Jones, 101—719.*

CHARGING AS PRINCIPAL.—Under an indictment for an assault with intent to kill, charging defendant as principal, he can not be convicted as accessory. *Green, 119—899.*

PRINCIPAL IN SECOND DEGREE.—A principal in the second degree is not an accessory but a co-principal. *Whitt, 113—716.*

Sec. 9 (978). Accessories to felonies after the fact, when, where and how tried and punished. R. C., c. 34. s. 54. 1797, c. 485, s. 1 1852, c. 58.

If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made, or to be made, such person shall be guilty of a misdemeanor, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such misdemeanor, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and shall be punished by imprisonment in the penitentiary or county jail, for not less than four months nor more than ten years; and may also be fined in the discretion of the court. And the offence of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction of the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed without the limits of the state; and in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offence of such person guilty of a misdemeanor as aforesaid, may be inquired of, tried, determined and punished in either of said counties: *Provided*, that no person, who shall be once duly tried for such misdemeanor, shall be again indicted or tried for the same offence.

Sec. 10 (979). Accessories, how proceeded against and punished where principal is not attained. R. C., c. 34, s. 55.

In order that accessories may be convicted and punished in all cases, it is enacted, that if any principal offender shall be in any wise convicted, it shall be lawful to proceed against an accessory,

either before or after the fact, in the same manner as if the principal felon shall die or be pardoned, or otherwise delivered before or after sentence or punishment; and every such accessory shall suffer the same punishment, if he be in anywise convicted, as he should have suffered if the principal had been sentenced or punished.

Sec. 11 (980). Accessories before the fact, how punished. 1868, c. 31, s. 2. 1874-'5, c. 212.

Any person who shall be convicted as an accessory, before the fact in either of the crimes of murder, arson, burglary or rape, shall be imprisoned for life in the penitentiary. An accessory before the fact to the stealing of any horse, mare, gelding or mule, on being duly convicted thereof, shall be imprisoned at hard labor in the penitentiary for not less than five nor more than twenty years, in the discretion of the court. Every accessory before the fact, in any other felony, shall be punished by imprisonment in the penitentiary or county jail, for not more than ten years, or may be fined, in the discretion of the court.

ACCOMPLICE.

CAUTION.—The usual direction not to convict upon the testimony of an accomplice, unless supported by other testimony, is only a precautionary measure to prevent improper confidence being reposed in it, and the propriety of giving this caution must be left to the discretion of the trial judge. Barber, 113—711.

UNSUPPORTED TESTIMONY.—The unsupported testimony of an accomplice, if it produces entire belief of the prisoner's guilt, is sufficient to warrant a conviction. Barber, 113—711.

ACTS AND DECLARATIONS AS EVIDENCE.—When a common design is proven, the *act* of one, in furtherance of that design, is evidence against his associates; but the *declarations* of one of the parties can be received only against himself. Poll, 8 (1 Hawks), 442.

MAY BE WITNESS FOR STATE.—An accomplice is a competent witness for the state on the trial of his associate. Wier, 12 (1 Dev.), 363.

DANGER—CAUTION.—It is dangerous to act exclusively on the evidence of an accomplice, and the court may properly caution the jury and point out the grounds for requiring confirmatory evidence. But the court can do nothing more, and if the jury really yield faith to it, it is not only legal but obligatory on their consciences to convict upon it. Hardin, 22, (2 D. & B.), 407.

CORROBORATION.—It is proper, before an accomplice offered as a witness is attacked, to prove by another witness that the accomplice related to him the facts immediately after they happened, such evidence being considered substantially in reply. Twitty, 9 (2 Hawks), 449.

ACCOMPLICE, EFFECT OF UNSUPPORTED TESTIMONY.—The jury may convict upon the unsupported testimony of an accomplice who testifies under promise of immunity from punishment. Mitchener, 98—689.

Conviction may be had on the unsupported testimony of an accomplice, and the propriety of cautioning the jury not to convict upon it unless it is supported is left to the sound discretion of the trial judge. Haney, 19 (2 D. & B.), 390.

The unsupported testimony of an accomplice is sufficient to warrant a conviction. Holland, 83—624.

WHAT KIND OF CORROBORATION NECESSARY.—The corroboration of an accomplice should be as to some matter which tends to prove or disprove defendant's guilt, though a conviction on the uncorroborated testimony of an accomplice is legal. Miller, 97—484.

A person may be convicted upon the unsupported testimony of an accomplice. Stroud, 95—626.

ACQUITTAL.

See FORMER CONVICTION AND ACQUITTAL.

ADDRESS OF COUNSEL.

See COMMENTS OF COUNSEL, and also ARGUMENT OF COUNSEL.

ADJOURNMENT.

See TERM OF COURT.

ADMINISTERING POISON.

See POISON.

ADULTERATION OF FOOD.

Sec. 12. Unlawful to sell adulterated or unbranded food. 1899, c. 86.

SECTION 1. For the purpose of protecting the people of the state from imposition by the adulteration and misbranding of articles of food, the board of agriculture shall cause to be procured from time to time, and under rules and regulations to be prescribed by them, in accordance with section nine of this act, samples of food, beverages and condiments offered for sale in the state, and shall cause the same to be analyzed or examined microscopically or otherwise by the chemists or other experts of the department of agriculture. The board of agriculture is hereby authorized to make such publications of the results of the examinations, analyses and soforth as they may deem proper.

SEC. 2. No person, by himself or agent, shall knowingly manufacture, sell, expose for sale or have in his possession with intent to sell, any article of food which is adulterated or misbranded within the meaning of this act; and any person who shall violate any of the provisions of this act shall be guilty of a misdemeanor, and for such offence shall be fined not exceeding two hundred dollars for the first offence, and for each subsequent offence not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court; and such fines, less legal costs and charges, shall be paid into the treasury of the state for the benefit of the department of agriculture, to be used exclusively in executing the provisions of this act.

SEC. 3. The chemists or other experts of the department of agriculture shall make, under rules and regulations prescribed by the board of agriculture, examinations of specimens of food, beverages and condiments offered for sale in North Carolina which may be collected from time to time under their directions from various parts of the state. If it shall appear from such examination that any of the provisions of this act have been violated, the commissioner of agriculture shall at once certify the facts to the proper solicitor, and furnish that officer a copy of the result of the analysis duly authenticated by the analyst under oath.

SEC. 4. It shall be the duty of every solicitor to whom the commissioner of agriculture shall report any violation of this act, to cause proceedings to be commenced and prosecuted without delay for the fines and penalties in such cases provided.

SEC. 5. The term "food" as used herein shall include all articles used for food—candy, condiment or drink, by man or domestic animals, whether simple, mixed or compound. The term

“misbranded” as herein used shall include all articles of food or articles which shall enter into the composition of food, the package or label of which shall bear any statement purporting to name any ingredients or substances as being contained or not being contained in such article, which statement shall be false in any particular.

SEC. 6. For the purpose of this act an article of food shall be deemed adulterated—

First. If any substance or substances has or have been mixed or packed with it, so as to reduce or lower or injuriously affect its quality or strength so that such product when offered for sale shall deceive or tend to deceive the purchaser.

Second. If any inferior substance or substances has, or have been substituted wholly or in part for the article so that the product when sold shall deceive or tend to deceive the purchaser.

Third. If any valuable constituent of the article has been wholly or in part abstracted so that the product when sold shall deceive or tend to deceive the purchaser.

Fourth. If it be an imitation of, and sold under the specific name of another article.

Fifth. If it be mixed, colored, powdered, coated, polished or stained in a manner whereby damage or infirmity is concealed, so that such product when sold shall deceive or tend to deceive the purchaser.

Sixth. If it contain any added poisonous ingredient, or any ingredient which may render such article injurious to the health of the person consuming it.

Seventh. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when branded so, or in an imitation either in package or label of an established proprietary product, which has been trade marked or patented.

Eighth. If it consists of the whole or any part of a diseased, filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal or animals that has died otherwise than by slaughter.

Ninth. That candies and chocolate may be deemed to be adulterated if they contain terra alba, barytes, talc, chrome yellow or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health: *Provided*, that an article of food, beverage, or condiment which does not contain any added poisonous ingredient shall not be deemed to be adulterated in the following cases:

First. In the case of articles, mixtures or compounds, which

may be now, or from time to time hereafter, known as articles of food, beverages or condiments under their own distinctive names, and not included in definition fourth of this section.

Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are mixtures, compounds, combinations, imitations or blends.

Third. When any matter or ingredient has been added to the food, beverage or condiment because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight or measure of the food, beverage or condiment, or conceal the inferior quality thereof: *Provided*, that the same shall be labeled, branded or tagged as prescribed by the board of agriculture so as to show them to be compounds and the exact character thereof; *And provided further*, that nothing in this shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods to disclose their trade formulas except in so far as the provisions of this may require to secure freedom from adulteration or imitation; *Provided further*, that nothing in this act shall be construed to apply to proprietary or patent medicines.

Fourth. Where the food, beverage or condiment is unavoidably mixed with some harmless extraneous matter, in the process of collection or preparation; *Provided further*, that no person shall be convicted under the provisions of this act when he is able to prove a written guaranty of purity in a form approved by the board of agriculture as published in their rules and regulations signed by the wholesale jobber, manufacturer or other party from whom he purchased said article.

SEC. 7. The board of agriculture is hereby authorized to cause all compound, mixed or blended products to be properly branded and prescribe how this shall be done.

SEC. 8. It shall be the duty of the board of agriculture to prepare and publish from time to time lists of the articles, mixtures or compounds declared to be exempt from the provisions of this act in accordance with section six. The board of agriculture shall also from time to time fix and publish the limits of variability permissible in any article of food, beverage or condiment, and these standards when so published shall remain the standards before all the courts: *Provided*, that when standards may or have been fixed by the secretary of agriculture of the United States they shall be accepted by the board of agriculture and published as the standards for North Carolina.

SEC. 9. Every person who exposes for sale or delivers to a pur-

chaser any condiment, beverage or article of food, shall furnish, within business hours, and upon tender and full payment of the selling price, a sample of such condiments, beverages or articles of food to any person duly authorized by the board of agriculture to secure the same and who shall apply to such manufacturer, or vender or person delivering to a purchaser such beverages or article of food, for such sample for such use in sufficient quantity for the analysis of such article or articles in his possession.

SEC. 10. Any manufacturer or dealer who refuses to comply upon demand with the requirements of section nine of this act, or any manufacturer, dealer or person who shall impede, obstruct, hinder or otherwise prevent or attempt to prevent any chemist, inspector or other person in the performance of his duty in connection with this act shall be guilty of a misdemeanor and shall upon conviction be fined not less than ten dollars nor more than one hundred dollars, or be imprisoned not more than one hundred days, or both, in the discretion of the court, and said fines, less legal costs, shall be paid into the treasury of the state for the benefit of the department of agriculture, to be used exclusively in executing the provisions of this act.

SEC. 11. This act shall not be construed to interfere with commerce, or any interstate commerce laws of the United States.

ADULTERY.

See FORNICATION AND ADULTERY.

ADVERTISEMENTS.

Sec. 13 (981). Advertisements and legal notices, destruction or defacing of, punished. 1876-'7, c. 215.

Any person who shall wilfully and unlawfully deface, tear down, remove or destroy any legal notice or advertisement authorized by law to be posted by any officer or other person, the same being actually posted at the time of such defacing, tearing down, removing or destruction, during the time for which such legal notice or advertisement shall be authorized by law to be posted, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

Sec. 14. Advertisements, misdemeanor to mutilate. 1885, c. 302.

Any person or persons who shall wantonly or maliciously mutilate, deface, pull or tear down, destroy or otherwise damage any notice, sign or advertisement, whether put up by an officer of the law in performance of the duties of his office, or other person for a lawful purpose, before the object for which such notice, sign or advertisement shall have been posted shall have been accomplished, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding twenty-five dollars or imprisoned not exceeding thirty days, at the discretion of the court: *Provided*, that nothing herein contained shall make punishable the mutilating, defacing, pulling down or tearing down, destroying or otherwise damaging notices, signs or advertisements which are immoral or obscene in themselves: *Provided further*, that nothing herein contained shall apply to any person mutilating, defacing, pulling or tearing down, destroying or otherwise damaging notices, signs or advertisements put up on his or her own land or lands, of which he or she may have charge or control, unless consent of such person to put up such notice, sign or advertisement shall have first been obtained, except those put up by an officer of the law in the performance of the duties of his office.

AFFRAY.

INDICTMENT.—An indictment which simply charges that defendants "did make an affray," without stating that it was done in a public place, or in what manner or by what acts, is defective. *Woody*, 47 (2 *Jones*), 335.

Where the indictment charges that the affray was committed in a *public place*, it need not specifically mention the place to enable the court to see that it was a public place. *Baker*, 83—649.

EVIDENCE.—Evidence that defendant saw his assailants on the forenoon of the day of the fight flourishing their pistols, and that his brother informed him that they had threatened defendant's sons, and that, in consequence of this information, defendant hastened to find his sons to prevent a difficulty and save his boys, is inadmissible. *Harrell*, 107—944.

JURISDICTION.—Where, on indictment for an affray, it appears that a deadly weapon was used by either party, the superior court has jurisdiction as to both defendants. *Coppersmith*, 88—614.

VERDICT.—After the jury had returned into court and intimated an intention to acquit one of the defendants, but had not announced their verdict, the court told them that if they believed the evidence both defendants were guilty; whereupon the solicitor directed the clerk to enter a verdict of guilty as to both, which was done, and the jury being asked if that was their verdict, made no direct assent except by a nod from each of them: *Held*, that this proceeding was so irregular and contrary to the established mode that the judgment should be set aside. *Shule*, 32 (10 *Ired.*), 153.

FIGHTING UNDER APPREHENSION OF GREAT BODILY HARM.—Where one engages in a fight willingly, he is guilty of an affray, and it is immaterial that he fought under a reasonable apprehension that his adversary had formed a purpose to make a violent assault upon him; nor is it any defence that during the encounter he fired a shot at his enemy under the belief that he was in danger of great bodily harm. Avery, J., *dissenting*. Harrell, 107—944.

HUSBAND MAY PREVENT ANOTHER FROM TAKING HIS WIFE.—While a husband is justified in using such force as may be necessary to prevent another from taking his wife from him, yet if she goes of her own volition it is otherwise. Weathers, 98—685.

WORDS CALCULATED TO BRING ON A FIGHT.—Defendant and another were quarrelling in the public road near the dwelling-house of the prosecutrix, the defendant having a pistol in his hand, and was cursing and using vulgar language in the hearing of the inmates of the house. The son of the prosecutrix came out with an ordinary walking-stick in his hand, and remonstrated with defendant, who, still holding his pistol, cursed and denounced him, saying he was in the public road and would do as he pleased. After the interchange of a few words the lie was given by defendant, and the son struck him with his stick, when defendant attempted to use his pistol, but was prevented by those present: *Held*, that defendant by his acts made himself a trespasser, and having used language calculated to bring on a fight, was guilty of an affray. Davis, 81—351.

If a person by such abusive language, or *offensive conduct towards another*, as is calculated to bring on a fight, induces that other to strike him, he is guilty, though he does not return the blow. Fanning, 94—940.

FORMER ACQUITTAL.—Where there is evidence, on the plea of former acquittal, that defendant was put on trial, and the record simply shows that he was "released," this will be taken as implying that he was acquitted. Bowers, 94—910.

GOING DANGEROUSLY ARMED.—The offence of riding or going armed with unusual and dangerous weapons, to the terror of the people, is an offence at common law, and is indictable in this state. Huntley, 25 (3 Ired.), 418.

BREACH OF THE PEACE.—Where several persons go to the house of an aged widow and fire several guns, killing her dog, they are guilty of a breach of the peace. Longford, 10 (3 Hawks.), 381.

FORMER ACQUITTAL OR CONVICTION.—A plea of former conviction or acquittal before a justice for a simple assault is a complete defense to an indictment for an affray in the superior court in which the charge is that defendants did wound and beat each other with deadly weapons, unless it should appear that the defendant making the plea had in fact used a deadly weapon or inflicted serious injury. Albertson, 113—633.

SIMPLE ASSAULT—DEADLY WEAPON—JURISDICTION.—An affray being a mutual fighting, and an indictment therefor being against each person, one may be convicted and the other acquitted, or one may be convicted of an assault with a deadly weapon and the other of a simple assault. Albertson, 113—633.

EVIDENCE SUFFICIENT.—It appeared that G, after walking up and down the street swearing that he could whip any man, struck A in the face with his fist, the blow being heard across the street; that A then struck G with a pair of iron plyers; that G then put his hand in his pocket as if to draw a knife and A caught him by the arms and prevented him from getting his hand out of the pocket, and G, getting loose, jumped on a box, and, saying he was an officer, commanded the peace. *Held*, that the evidence was sufficient to support a verdict of guilty against G. Amis, 119—804.

THREAT.—On the trial of several persons for an affray, testimony that one of them, who was the antagonist of the others, had stated to third persons on the day of the difficulty that if one of the other defendants should come to his house that night he would kill him, was admissible for the purpose of impeachment, but incompetent to prove motive. *Goff*, 117—755.

CO-DEFENDANTS MAY IMPEACH.—Where, on the trial of four persons indicted for an affray, three of them testified, and the fourth, their antagonist, was called in his own behalf, the other defendants had the same right to impeach him on cross-examination as though he had been a witness instead of a co-defendant. *Goff*, 117—755.

BURDEN ON DEFENDANT TO JUSTIFY.—Where defendant charged with an affray admits that he used a deadly weapon the question of reasonable doubt is eliminated and the burden of showing matter of mitigation, excuse or justification, is thrown upon him. *Barringer*, 114—840.

AIDER AND ABETTOR.

A person is not bound to interfere even to prevent the commission of a felony in his presence, and is not to be regarded as an aider or abettor because he does not interfere. To constitute him and aider or abettor it is necessary that he should do something showing his consent to the felonious purpose and contributing to its execution. *Hildreth*, 31 (9 Ired.), 440.

Where several persons are attempting to kill another, or aiding and abetting, and one does the killing, all may be found guilty. *Whitson*, 111—695.

Where one aids and abets the commission of a burglary, although he does not go within 40 feet of the house that is broken, he is equally guilty with the one who actually enters. *Pearson*, 119—871.

If a person be present aiding and abetting in the commencement of an assault with intent to rescue a prisoner, he does not cease to be guilty because his fears prevent him from going all lengths with his party. *Morris*, 10 (3 Hawks), 388.

NO ACCESSORIES IN LARCENY.—There are no accessories before the fact in larceny; all who aid, abet, advise or procure the crime are principals. *Stroud*, 95—626.

ALIBI.

See EVIDENCE, this sub-title.

ALTERATION OF INSTRUMENT.

See FORGERY.

AMENDMENT.

See JUSTICES OF THE PEACE, JURISDICTION, REMOVAL, INDICTMENT.

AMNESTY.

See PARDON.

APPEAL.

See also CERTIORARI and RECORDARI.

SEC. 15. Appeals to be entered by clerk on judgment docket; case, how stated and settled.

SEC. 16. Appeals by defendant to supreme court.

SEC. 17. Appeals in criminal cases, effect of.

SEC. 18. Clerk to direct sheriff to execute sentence when judgment affirmed.

SEC. 19. Convicted persons may appeal without giving security for costs.

SEC. 20. Judge to grant appeal and require defendant to give security for his appearance.

SEC. 21. Appeal by state, in what cases.

Sec. 15 (550). Appeals to be entered by clerk on judgment docket; case, how stated and settled. C. C. P., s. 301. C. C. P., s. 311. 1889, c. 161.

Within the time prescribed in the preceding section, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party, unless the record shows an appeal taken or prayed at the trial, which shall be sufficient. He shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the requests of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating

separately in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within ten days from the entry of the appeal taken; within five days after such service, the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved; if returned with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him; and the judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district, which time shall not be more than twenty days from the receipt of such request; and at the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or if the attorneys be not present, file a copy in the office of the clerk of the court: *Provided*, that if the judge shall have left the district before the notice of disagreement, he may settle the case without returning to the district. In settling the case, the written instructions signed by the judge, and the written requests for instructions signed by the counsel, and the written exceptions shall be deemed conclusive as to what such instructions, requests and exceptions were. If a copy of the case settled was delivered to the appellant, he shall, within five days thereafter, file the same with the clerk, and in case he fails to do so, the respondent may file his copy. The judge shall settle the case on appeal within sixty days after the termination of a special term or after the courts of the district shall have ended, and if the judge in the meantime shall have gone out of office, he shall settle the case as if he were still in office, and any judge failing to comply with this section shall be liable to a penalty of five hundred dollars, for the use of any person who shall sue for the same.

CASE SETTLED BY THE JUDGE ACCEPTED, THOUGH NOT MADE IN PROPER TIME.—An appellant has no right to demand that his statement of the case on appeal be taken instead of the case as settled by the trial judge on the ground that the judge failed to settle the case within sixty days after the courts of the district had closed. Appellant's remedy is an action against the judge under The Code, section 550, for the penalty of \$500 for failure to settle the case within the prescribed time, but such failure of the judge can not cause the appellee to lose his right to have the case settled by the judge upon disagreement. Williams, 109—.

JUDGE NEED NOT GIVE NOTICE, WHEN.—The judge is not required to give notice of the time and place of settling the case on appeal when he is not requested to do so. Williams, 109—.

Sec 16. (1234). Appeals by defendant to supreme court. R. C., c. 4, s. 21. 1818, c. 962, s. 4. 1887, c. 192.

In all cases of conviction in the superior or criminal courts for any criminal offence, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court; and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions, but no appeal shall have the effect of vacating the judgment appealed from, but upon perfecting the appeal as required by law, or upon appeal perfected in *forma pauperis*, the judge shall direct a stay of execution during the pendency of said appeal.

WHEN APPEAL WILL LIE.—No appeal lies from a judgment overruling a demurrer to an indictment, but defendant must be required to plead, and the court proceed to judgment before the appeal will lie. Polk, 91—652.

HOW CASE SETTLED FOR SUPREME COURT.—Appeals in criminal actions must be perfected, and the case for the supreme court settled as provided in civil actions. Lee, 90—652.

When appellant's case on appeal is served in time, and no exceptions or counter-case is served, it becomes the "case on appeal." Carlton, 107—956.

NO STATEMENT NECESSARY. WHEN.—When the ground of exception to the order of the court sufficiently appears in the record, no statement of the case on appeal is necessary. Byrd, 93—624.

JUDGE MAKING STATEMENT ON FAILURE OF APPELLANT TO SERVE CASE ON APPELLEE, EFFECT OF.—Where it appears that the appellant served no case on the appellee, but the judge makes the statement of the case on appeal, it will be presumed that he did so by consent of the parties. Crook, 91—536.

SURETY MUST JUSTIFY IN DOUBLE THE AMOUNT OF BOND.—Where the surety only justifies in the amount, and not double the amount of undertaking, the appeal will be dismissed. Roper, 94—859.

JUDGMENT AFFIRMED. WHEN.—Where there is no statement of case on appeal, no assignment of error, and no error appears on the record, the judgment must be affirmed. Brown, 106—645.

CASE MUST CONTAIN PRAYERS FOR INSTRUCTION AND EVIDENCE.—Where exception is taken to the refusal of certain prayers for instruction, in preparing the case for the supreme court, the prayers for instruction and the evidence bearing on them should be set out in the case. Sloan, 97—499.

Where evidence is offered to impeach a witness, and is rejected, the case on appeal must state the testimony of the witness sought to be impeached in order to show the alleged error. Barber, 89—523.

Exceptions to the admission of evidence must state what the evidence was, that the court may see whether it was illegal. Clark, 34 (12 Ired.), 151.

An exception to the refusal to allow a question to be asked must state what was expected to be shown by the inquiry, otherwise it does not appear that any injury resulted from the exclusion of the evidence. Rhyne, 109.

An exception to the rejection of evidence can not be considered when the evidence proposed is not set out in the record. Keath, 83—626.

SURETY MAKING MARK SUFFICIENT.—An undertaking executed by a surety, who simply makes his cross-mark and justifies before the clerk, is sufficient. Byrd, 93—624.

CASE REMANDED, WHEN.—When the transcript fails to show that a court was held by a judge at the time and place prescribed by law, that a grand jury was drawn and sworn and presented the indictment, or that the plea of not guilty was entered, the case will be remanded for a more perfect record. Farrar, 103—411.

WITHDRAWAL OF APPEAL.—Appeals in misdemeanors may be withdrawn by counsel for defendant, with the consent of the attorney-general, but in felonies it must appear affirmatively that the prisoner advisedly assents to and desires the withdrawal of his appeal. Leak, 90—655.

After appeal to the supreme court, the appeal can not be withdrawn when the attorney-general opposes the application, and no good cause is shown why it should be granted. Brewer, 98—607.

STATUTE REPEALED PENDING APPEAL.—If, pending an appeal in a criminal case, the statute authorizing the indictment is repealed, judgment will be arrested. Nutt, 61 (Phil. Law), 20.

SECOND APPEAL FOR SAME CAUSE.—Where defendant appealed and the judgment was affirmed by the supreme court, and the trial judge, on receiving the certificate of the supreme court, imposed the same sentence which had been imposed before, a second appeal, without assigning any error or showing any new facts, will be dismissed. Following *State v. Speaks*, 95—689. *Miller*, 97—450.

APPEAL VACATES JUDGMENT.—An appeal to the supreme court vacates the judgment, whether it be imprisonment or fine. *Miller*, 94—908.

EXCEPTIONS MUST BE SPECIFIC.—The exceptions of the appellee to the appellant's statement on appeal should be specific, and where, in case the appellee's statement is sent up, they are so general as to leave the case indefinite, it will be remanded to the court below in order that it may be settled by the judge. *King*, 119—910.

RES ADJUDICATA.—While an affirmance of a judgment on appeal is necessarily an adjudication upon every assignment of error and of every matter which might have been urged in arrest of judgment, yet, where a new trial is granted, the judgment is *res adjudicata* only upon the errors ruled upon in the opinion though other errors were assigned on the appeal. *Perry*, 122—1018.

NO APPEAL FROM CRIMINAL TO SUPREME COURT.—No appeal lies to the supreme court from a criminal or other inferior court. *Hanna*, 122—1076.

JUDGES NOTES NOT ACCESSIBLE.—In the absence of any allegation or ground to the contrary, a case on appeal certified by the judge will be taken as correct, where the notes of the evidence and charge were not accessible in making up the case. *Journigan*, 120—568.

COUNSEL FOR PRIVATE PROSECUTOR.—Counsel for a private prosecutor, who aids the solicitor in the trial of a criminal case, has no authority to accept a statement of case on appeal. *Cameron*, 121—572.

REPRESENTATIVE OF SOLICITOR.—Where the solicitor is not present at the trial of a criminal case, the case on appeal may be served on the attorney who represents him officially, with the sanction and approval of the court, and, in such case, the appointment of such representative must be made a matter of record and appear in the transcript of the record on appeal. *Cameron*, 121—572.

NO EVIDENCE.—An exception that there is no evidence sufficient to go to the jury is too late when taken after verdict. *Wilson*, 121—650.

AGREEMENT AS TO THE EVIDENCE.—Where the solicitor agrees that the judge's notes of the testimony shall be a part of the record on appeal

and such notes are incomplete, but are the only record of the evidence, he is bound by the insufficiency of the evidence shown thereby. Wilson, 121—650.

FROM CRIMINAL TO SUPERIOR COURT.—The appeal from a criminal court to the superior court should contain a concise statement of the case as in appeals from the superior to the supreme court. Hinson, 123—755.

The superior court, on appeal from the circuit criminal court, reviews only questions of law passed upon by the criminal court. The defendant is not entitled a trial *de novo* in the superior court. Hinson, 123—755.

TIME EXPIRED.—Where eleven days elapse after the adjournment of the court all assignments of error, other than those to matters of record, will be disregarded. Perry, 122—1018.

LANGUAGE OF INSTRUCTIONS NOT REQUIRED.—Where the instructions asked for are given in substance and effect, no exception will lie because they are not given in the language of the request. Mills, 116—992.

APPEAL DISMISSED ON ESCAPE.—Where, pending an appeal of a prisoner convicted of a capital felony, he makes his escape, the supreme court has power to dismiss the appeal, or hear, or continue it. Anderson, 111—689.

ENTIRE CHARGE NOT SENT.—Where the entire charge is not sent up it will be presumed that it is correct, except in those particulars in which errors are assigned in the case on appeal. Cox, 110—503.

Where the case states that the judge recapitulated the evidence to the jury an assignment of error that the court did not recapitulate the evidence will not be considered. Hart, 116—976.

DEMURRER SUSTAINED.—A demurrer to a bill for a misjoinder raises a question of law, and if the demurrer be sustained an appeal by the state lies. Harris, 106—682.

COSTS OF TRANSCRIPT.—The clerk has no right to demand the costs of the transcript to be paid before sending up the case on appeal, whether an appeal bond is filed or the appeal is in *forma pauperis*. The prohibition against requiring fees in advance in criminal actions embraces all services. Nash, 109—.

Sec. 17. Appeals in criminal cases, effect of. 1887, c. 191.

In criminal cases an appeal to the supreme court shall not have the effect of vacating the judgment appealed from, but upon perfecting the appeal as now required by law, either by giving bond or in *forma pauperis*, there shall be a stay of execution during the pendency of the appeal.

The clerk of the superior court, upon the receipt of the certificate of the supreme court, in all criminal cases, not capital, in which "no error" has been certified, shall forthwith issue to the sheriff of the county an execution embodying the judgment of the superior court appealed from, requiring the sheriff to execute the judgment, which he shall immediately proceed to do.

When the sentence in whole or in part directs the payment of a fine, the judgment shall be docketed by the clerk and be a lien on the real estate of the defendant in the same manner as judgments in civil actions, and executions thereon shall only be stayed upon an appeal taken by security being given in like manner as

is required in civil cases. Should the judgment be affirmed, the clerk of the superior court on receipt of the certificate from the supreme court shall issue execution on such judgment.

APPEAL WITHDRAWN ON ACCEPTANCE OF COMMUTATION OF SENTENCE.—Where the governor commutes a sentence of death to imprisonment for life in the penitentiary, and the prisoner accepts such commutation, and in pursuance of the same goes to the penitentiary pending his appeal to the supreme court, and, on his case being called, he exhibits his commutation and prays to be allowed to abandon his appeal, to which prayer no objection is made by the attorney-general, the appeal will be dismissed. Mathis, 109—.

Sec. 18. Clerk to direct sheriff to execute sentence when judgment affirmed. 1887, c. 192.

In criminal cases the clerk of the superior court, in all cases where the judgment has been affirmed (except where the conviction is a capital felony), shall forthwith, on receipt of the certificate of the opinion of the supreme court, notify the sheriff, who shall proceed to execute the sentence which was appealed from. In criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for trial at the first ensuing term of the court after the receipt of such certificate. In all cases of affirmance of a sentence for a capital felony the clerk of the supreme court, at the same time that the decision of the supreme court is certified down to the superior court, shall send a duplicate thereof to the governor, who shall immediately issue his warrant under the great seal of the state to the sheriff of the county in which the appellant was sentenced, directing him to execute the death penalty on a day specified in said warrant, not less than thirty days from the date of said warrant; but this shall not deprive the governor of the power to pardon or reprieve the defendant, or to commute the sentence.

Sec. 19 (1235). Convicted persons may appeal without giving security for costs. 1869-'70, c. 196, s. 1.

In all such cases of conviction in the said courts, the defendant shall have the right to appeal without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith.

AFFIDAVIT.—An affidavit that defendant is unable to give bond or security and has no property whatever, and "that he is advised by his counsel to appeal," is fatally defective for failure to state that he is advised by his counsel that he has "*reasonable cause for the appeal prayed, and that the application is made in good faith.*" Moore, 93—500.

If the affidavit fails to state that the appeal is taken in good faith, the appeal will be dismissed. Payne, 93—612.

In such case the court has no discretion, but the appellee can have the appeal dismissed as a matter of right. *Ib.*

Where the affidavit is not sent up, but the substance is set forth in the order allowing the appeal, from which it appears that it was fatally defective, a presumption that the order was based on a sufficient affidavit can not arise. *Jones, 93—617.*

Where the affidavit of the surety fails to state that he is worth *double* the amount of the bond, an entry in the record, "Bond fixed at \$25; *bond filed.*" is not sufficient to show that the court received and approved the undertaking, and that the appellee thereby waived the defect. *Distinguishing Hancock v. Bramlett, 85 N. C., 393. Wagner, 91—521.*

An appeal without bond or affidavit allowed "by consent" will not be entertained. *Kerns, 90—600.*

APPEAL IN FORMA PAUPERIS—PRACTICE.—An affidavit upon which is founded an order allowing a convicted person to appeal *in forma pauperis*, under section 16 (The Code, section 1235), is fatally defective if it does not state that the application is in good faith. *Tow, 103—350.*

If an order is made allowing a defendant to appeal as a pauper, and the affidavit and certificate of counsel are not in the record sent to the supreme court, it will be presumed that they are in due form; but if they are sent up, and are not in due form, the appeal will be dismissed on motion of the appellee. *Tow, 103—350.*

Where the substance only of the affidavit is set out and the court sees it is insufficient the appeal will be dismissed on motion of the appellee, not as a matter of discretion, but as a matter of right. *Jackson, 112—849.*

The omission that the affidavit is made in good faith is fatal. *Bramble, 121—603.*

The allowance of a motion to dismiss an appeal for failure to observe the requirements of the statute is a matter of right and not of discretion; and, therefore, where the case on appeal simply shows that the defendant prayed an appeal and "upon filing his affidavit of his inability to give security for the cost of appeal," was allowed to appeal without bond, the appeal will be dismissed on motion. *Harris, 114—830.*

It is not necessary that the affidavit should state the name of counsel by whom the applicant is advised that he has reasonable ground for appeal. *Perkins, 117—698.*

Sec. 20 (1236). Judge to grant appeal and require defendant to give security for his appearance. 1869-'70, c. 196, s. 2.

It shall be the duty of the judge on filing the affidavit required in the preceding section, to grant the appeal without security for costs, and for any bailable offence shall require the defendant to enter into recognizance in a reasonable sum to make his appearance at the first term of the superior or criminal court to be held in the county and to further answer the charge preferred.

Sec. 21 (1237). Appeal by state; in what cases recognized.

An appeal to the supreme court may be taken by the state in the following cases, and no other. Where judgment has been given for the defendant—

- (1) Upon a special verdict;
- (2) Upon a demurrer.

- (3) Upon a motion to quash;
- (4) Upon arrest of judgment.

HABEAS CORPUS.—No appeal for the state lies from a judgment releasing a prisoner on *habeas corpus*. Miller, 97—451.

MARKING ONE AS PROSECUTOR.—The state has no right to appeal from the refusal of the court to mark one as prosecutor of record. Moore, 84—724.

FINDING OF COURT CONCLUSIVE.—where the court finds as a fact that the prosecution was frivolous or malicious the finding is conclusive, and the prosecutor can not appeal. Lance, 103—.

NO APPEAL FROM ORDER SETTING VERDICT ASIDE.—Where the jury return a verdict of guilty, subject to the opinion of the court upon a case agreed, the court has no power to set the verdict aside, and direct a verdict of not guilty, but where such order is made the state has no appeal. Padgett, 82—544.

APPEAL FROM ORDER ARRESTING JUDGMENT.—Where an appeal by the state from an order arresting judgment, is dismissed by the supreme court on the ground that the record shows the appeal to have been taken from an order granting a new trial, it is not error for the court below to refuse to pronounce judgment upon the verdict, though on receiving the certificate from the supreme court the court below corrects the record so as to show a verdict of guilty and judgment arrested, since the order arresting judgment still remains unreversed. Keeter, 82—547.

CASE REMANDED.—The state can not appeal from a ruling of the superior court remanding a case to an inferior court for the imposition of a lighter sentence. Davidson, 124—.

The state can not appeal from a ruling of the superior court that a defendant is entitled to a trial *de novo* on appeal from a criminal court to the superior court. Hinson, 123—755.

APPRENTICES.

Sec. 22. Apprentices, employer not to violate indenture. 1889, c. 169.

If any employer shall wilfully violate any duty to his apprentice as stipulated in the indentures binding said apprentice, and refuses to make amends therefor, for the period of thirty days, and that fact shall appear in the judgment of the clerk canceling the indentures, or at the conclusion of the apprenticeship, the said employer shall be guilty of a misdemeanor, and on conviction may be fined or imprisoned at the discretion of the court.

ARGUMENT OF COUNSEL.

See also **COMMENTS OF COUNSEL.**

ARGUMENT ON MOTIONS LIMITED.—Section 30 of The Code, which allows an attorney such time as he thinks necessary for the proper presentation of his client's case, applies only to the trial of criminal and civil cases, and does not apply to the arguments of counsel on motions and questions arising during trial. *Jones*, 117—768.

RIGHT TO OPEN AND CONCLUDE.—Under Rule 6, supreme court, the right to open and conclude the argument is left to the discretion of the judge, and his action is not reviewable. *Anderson*, 101—758.

Where there are several defendants, and only one introduces evidence, the right to open and conclude the argument remains in the state. *Robinson*, 124—801.

READING BOOKS OTHER THAN LAW BOOKS.—On the trial of a prisoner charged with poisoning his wife the court properly refused to permit counsel for the defendant to read to the jury from a treatise on toxicology, which could not have been admitted as evidence, and concerning which no witness had been examined. *Rogers*, 112—874.

READING LAW BOOKS.—Counsel may read adjudged cases in their arguments to the jury, but the facts contained in such cases can not be commented on as the facts of the case on trial. *Powell*, 94—965.

Counsel have no right to read, in their argument to the jury, an opinion of the supreme court delivered on an appeal from a former trial of the same case, detailing some of the facts of the case as they then appeared. *Smallwood*, 78—560.

Counsel have no right to read a statement of facts contained in the report of a former trial of the same case in the supreme court for the purpose of contrasting such statement with the statement of the witnesses in the pending trial. *Whit*, 50 (5 *Jones*), 224.

ARREST.

SEC. 23. Persons present at breaches of the peace to arrest offenders.

SEC. 24. Persons summoned by officer must assist in the arrest.

SEC. 25. Peace officers to arrest without warrant in certain cases.

SEC. 26. Houses may be broken open to prevent a felony therein.

SEC. 27. Officers may break open doors.

SEC. 28. Persons in whose presence infamous crime committed may arrest offender.

SEC. 29. Persons arrested without warrant to have immediate hearing.

SEC. 30. No person to be arrested on presentment, nor tried except on indictment.

Sec. 23 (1124). Persons present at breaches of the peace to arrest offenders. 1868-'9, c 178, sub chap. 1, s. 1.

Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and if necessary for that purpose, shall arrest the offenders.

VERBAL ORDER TO PRIVATE PERSON.—The mere verbal order of a justice of the peace to a private person will not justify such person in making an arrest for an affray not committed in his presence. *Campbell*, 107—948.

A private person has no authority to make an arrest for a riot, rout, affray, or other light breach of the peace, without a warrant, except when such offences are being committed in his presence. *Campbell*, 107—948.

Sec. 24 (1125). Persons summoned by officer must assist in the arrest. 1868-'9, c. 178, sub chap. 1, s. 2.

Every person summoned by a judge, justice, mayor, intendant, chief officer of any incorporated town, sheriff, coroner or constable, to aid in suppressing any riot, rout, unlawful assembly, affray or other breach of the peace, or to arrest the persons engaged in the commission of such offences, or to prevent the commission of any felony or larceny which may be threatened or begun, shall do so.

INDICTMENT.—An indictment for refusing to assist an officer in securing a person arrested must set forth the authority by which the arrest was made; an allegation that the arrest was by lawful authority is not sufficient. Shaw, 25 (3 Ired.), 20.

WARRANT MUST BE MADE KNOWN.—When an arrest is made by one not a known officer he is bound to make known, at the time, the warrant under which he arrests. Kirby, 24 (2 Ired.), 201.

EVIDENCE.—On indictment for resisting arrest for an assault made by defendant on his wife committed in the presence of the officer, evidence that bystander said to the officer in the presence and hearing of defendant, that defendant "is a bad man, he has been beating his wife, he will kill her; you better take him up," such statement being undenied by defendant, is competent as an admission of defendant, and is also pertinent as showing the necessity for the prompt interposition of the officer. Crockett, 82—599.

Sec. 25 (1126). Peace officers shall arrest without warrant in certain cases. 1868-'9, c. 178, sub chap. 1, s. 3.

Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony or larceny has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest.

BREACH OF PEACE IN PRESENCE OF OFFICER.—When defendant strikes his wife with a stick in a public road, so near to a justice of the peace that he hears the sound of the blow and the cries of the woman, though, on account of the darkness, he does not actually see the assault, it is such a breach of the peace in the presence of the officer as authorizes him to arrest the assailant without warrant. McAfee, 107—812.

Sec. 26 (1127). Houses may be broken open to prevent a felony therein. 1868-'9, c. 178, sub chap. 1, s. 4.

All persons are authorized to break open and enter a house to prevent a felony about to be committed therein.

Sec. 27 (1128). Officers may break open doors to arrest persons charged with high crimes. 1868-'9, c. 178, sub chap. 1, s. 5.

If a felony or other infamous crime has been committed, or a dangerous wound has been given, and there is reasonable ground

to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff, coroner, constable, or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief.

Sec. 28 (1129). Persons in whose presence an infamous crime is committed, may arrest the offender. 1868-'9, c. 178, sub chap. 1, s. 6.

Every person in whose presence a felony or other infamous crime has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offence and it shall be the duty of every sheriff, coroner, constable or officer of police, upon information, to assist in such arrest.

PURPOSE TO ARREST MUST BE MADE KNOWN.—A private person may arrest for felony without warrant, where it appears that it is necessary to prevent the escape of the felon. In making such arrest he must notify the felon of his purpose, or he will be guilty of a trespass. Bryant, 65—327.

If the officer be a known officer he need not show his warrant, but if a special officer he ought to show the warrant. Curtis, 2 (1 Hay.), 543.

Sec. 29 (1130). Persons arrested without warrant entitled to have an immediate hearing. 1868-'9, c. 178, sub chap. 1, s. 7.

Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereupon proceed to act as may be required by law.

Sec. 30 (1875). No person to be arrested on a presentment, nor tried, except on indictment. R. C., c. 35, s. 6. 1797, c. 474, s. 3. 1879, c. 12.

No person shall be arrested on a presentment of the grand jury, or put on trial before any court, but on indictment found by the grand jury.

ARREST OF JUDGMENT.

Judgment can not be arrested because the indictment does not show, either in the caption or any other part, that it was taken before any court in North Carolina. The indictment stands upon the records of the court, and, is therefore, an indictment of that court. Brickell, 8 (1 Hawks), 354.

Judgment can be arrested only for matter appearing, or for some matter which ought to, but does not appear in the record. Lanier, 90—714.

A motion in arrest will not lie on the ground that the endorsement on the bill that the witnesses were sworn and sent to the grand jury is not signed by the clerk, for it is no part of the record. Lanier, 90—714.

The repeal of a statute pending a prosecution under it arrests the proceeding, and withdraws all authority to pronounce judgment, even after a conviction, and the defendant is entitled to a discharge. Long, 78—571. Cress, 49 (4 Jones), 421.

Where the statute under which the prosecution is commenced is repealed pending an appeal, the judgment will be arrested. Nutt, 61 (Phil.), 20.

A motion in arrest of judgment on the ground that the bill fails to aver that a deadly weapon was used, that serious damage was done, that six months elapsed before the finding of the bill, or that the offence was committed within one mile of a court during the session thereof, can not be sustained, even though the assault is alleged to have been made in the same month in which the bill was found, since the averment of the time when the act was done is not essential and not traversible, and defendant can have the benefit of these pleas under the general plea of not guilty. Taylor, 83—601.

Where the indictment is for assault and battery in the usual form, and the jury return a verdict finding defendant "guilty of shooting" without saying what he shot or in what direction, the judgment must be arrested. Hudson, 75—246.

When the same act is charged in one bill as an assault and battery, and in another as an assault with intent to commit rape, and the jury convict of a simple assault only, an alleged misjoinder of the charges can not be taken advantage of by motion in arrest of judgment. Watts, 82—656.

The indictment charged the burning of a dwelling-house on the first day of January, 1871, but the offence was in fact committed August 8th, 1871. At that time there were two statutes relating to the crime of arson, the act of 1869 prescribing punishment by confinement in the penitentiary, while the act ratified April 4, 1871, which repealed all laws in conflict with it, prescribed the death penalty as the punishment for arson, both statutes having reference only to the punishment. The indictment concluded, "contrary to the form of the statute," and there was a verdict of guilty as charged: *Held*, that judgment should have been arrested, since the court could not see from the record whether the prisoner was convicted under the act of 1869 or under the act of 1871. Had the indictment averred that the offence was committed after the ratification of the act of 1871 the court could have pronounced judgment of death. Wise, 66—120.

On the return of the supreme court certificate arresting the judgment in the above case, the prisoner's counsel filed a plea for his discharge, in which it was alleged that in support of the indictment a witness on the former trial testified that the burning was on the first day of August, 1871, which fact was admitted by the solicitor for the state: *Held*, that the plea filed by the counsel admitting the time when the crime was committed could not aid the indictment so as to authorize judgment of death to be pronounced as on a conviction under the act of 1871. Wise, 67—281.

MOTION IN ARREST MAY BE FIRST MADE IN SUPREME COURT.—Where it does not appear from the record that, in some aspect of it, the judgment rendered is warranted, a motion in arrest of judgment may be made in the supreme court, though not made in the court below. Roanoke Railroad and Lumber Co., 109—.

A motion for arrest of judgment for insufficiency of the indictment may be made in the supreme court for the first time. Caldwell, 112—854.

ARSON.

Sec. 31 (1985). Arson and other burnings. punishment for. R. C., c. 34, s. 2. 1870-'1, c. 222.

(1) Any person convicted according to due course of law of the crime of arson, shall suffer death.

1863, c. 17. 1868-'9, c. 167, s. 5.

(2) Every person convicted of any wilful burning of any gin house or tobacco house, or any part thereof, or in the night time, of any stable containing a horse or a mule, shall be imprisoned in the penitentiary not less than five, nor more than ten years.

R. C., c. 34, s. 7. 1830, c. 41, s. 1. 1868-'9, c. 167, s. 5.

(3) Any person who shall wilfully and maliciously burn the state house, or any of the public offices of the state, or any court house, jail, arsenal, clerks' office, register's office, or any house belonging to any county or incorporated town in the state, or to any incorporated company whatever, in which are kept the archives, documents, or public papers of such county, town, or corporation, shall, on conviction, be imprisoned in the penitentiary for not less than five, nor more than ten years.

R. C., c. 34, s. 30. 1825, c. 1278.

(4) If any person, with intent to destroy the same, shall wilfully and maliciously set fire to and burn any public bridge, or private toll bridge, or the bridge of any incorporated company, or any fire-engine house, or any house belonging to any county or incorporated town, used for public purposes other than the keeping of archives, documents and public papers, or any house belonging to an incorporated company and used in the business of such company; or if any person shall wilfully and maliciously attempt to burn any of the said houses or bridges, or any of the houses or buildings mentioned in this chapter, the person so offending shall be guilty of a misdemeanor, and punished by imprisonment in the penitentiary or county jail, for not less than four months nor more than ten years.

1874-'5, c. 133. 1885, c. 42.

(5) Any person who shall wilfully burn or destroy any other person's corn, cotton, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shucks or other provender in a stack, hill, rick or pen, or secured in any other way out of doors, or grass

or sedge standing on the land, shall be guilty of a misdemeanor, and punished by imprisonment in the county jail or penitentiary for not less than four months nor more than five years.

1874-'5, c. 228. 7 and 8 Geo. IV, c. 30, s. 2. 1885, c. 66.

(6) Whoever shall wantonly and wilfully set fire to any church, chapel or meeting-house, or shall wantonly and wilfully set fire to any stable, coach-house, outhouse, warehouse, office, shop, mill barn or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, shall be guilty of felony, and imprisoned in the penitentiary for not less than five nor more than forty years.

1876-'7, c. 13.

(7) Any person who shall wilfully attempt to burn any dwelling-house, uninhabited house, barn, stable, or outhouse, or mill, manufacturing house, cotton gin, tobacco barn, granary or turpentine distillery, the property of another, the person so offending shall be guilty of a misdemeanor, and punished by imprisonment in the penitentiary or county jail, and may also be fined, in the discretion of the court.

INDICTMENT.—An indictment charging that "defendant" a certain dwelling-house belonging "to one B and in the possession of one J, and by him occupied, feloniously, wilfully and maliciously did set fire to," sufficiently charges the offence of arson. McCarter, 98—637.

Where an indictment for burning an uninhabited house, charges that the act was "feloniously" done, the word "feloniously" may be treated as mere surplusage. Edwards, 90—710.

An indictment which fails to allege that the act was done "wantonly and wilfully," is fatally defective, and the words "*unlawfully, maliciously or feloniously*" will not supply the defect. Morgan, 98—641.

Where the indictment charged that defendant "did set fire to a certain house, used as a shop and store," it sufficiently charges that he set fire to a "shop" within the meaning of the statute. *Ib.*

Where the indictment charges that defendant did "*feloniously*" set fire to the house, it is not error to charge that if the jury are satisfied that defendant burnt the house "*as alleged in the bill of indictment*" he would be guilty, since the use of the word "*feloniously*," the other necessary words being used, is mere surplusage. Keen, 95—646.

The indictment charged that defendant, "*on the first day of April, 1885, unlawfully and maliciously and feloniously did set fire to*" a certain mill "*with intent thereby to injure and defraud*" certain corporations named "*contrary to the forms of the statute.*" The Code, section 985, par. 6 then provided that "*whoever shall unlawfully and maliciously set fire to, etc., with intent thereby to injure or defraud any person or persons, body politic or corporation,*" shall be guilty of felony. The act of 1885, c. 66, struck out the words "*unlawfully and maliciously*" and substituted

"wantonly and wilfully," and struck out the words "with intent thereby to injure or defraud," etc. The act of 1885 was ratified February 16th, 1885: *Held*, that a motion to quash the indictment on the ground that the amendment repealed the material parts of the statute of which it is amendatory, and that the amendment was ratified *after* the commission of the offence as charged, and that no offence under the statute as amended was charged in the indictment, was properly allowed. *Massey*, 97—465.

An indictment for burning a barn must aver that the act was done "with intent thereby to injure or defraud" some person. *Porter*, 90—719.

NOTE.—The words above quoted were stricken out by the act of 1885, c. 66.

The indictment need not allege that the prisoner set fire to the building with intent to injure or defraud some person. *Rogers*, 94—860.

An indictment charging that defendant did "*set fire to a certain lot of fodder in a stack and out of doors*," is fatally defective. The term "*set fire to*" is not the legal equivalent of the word "*burn*" used in the statute. *Hall*, 93—571.

An indictment charging the burning of a dwelling-house occupied by the defendant "*as lessee*" is good. *Graham*, 121—623.

An indictment which fails to use the words "*wantonly and wilfully*" will be sustained under subsection 2 of this act. *Pierce*, 123—745.

It is not necessary to allege that the burned building was in the possession of some person named, but it is sufficient to allege that it was the property of some one. *Daniel*, 121—574.

WHAT IS A CRIME.—Where a statute either makes an act unlawful, or simply imposes a punishment for its commission, such act becomes a crime without any express declaration to that effect. *Pierce*, 123—745.

COTTON IN RAILROAD CAR.—This statute does not embrace cotton stored in a railroad car standing on the track at a depot, whether it is thus and there secured temporarily, or to be shipped to some other place, since it is not then "*out of doors*" and "*on the land*," and an indictment for burning bales of cotton thus secured in a car can not be sustained. *Avery*, 109—.

EVIDENCE.—On indictment for burning a gin, after evidence has been introduced tending to convict the prisoner, other evidence tending to show that the prisoner had been paid for committing the crime, and his declarations shortly before the fire that he had no money but expected to have some soon, and the fact that shortly after the fire he did have money, are competent. *Green*, 92—779.

On indictment for setting fire to an outhouse used as a kitchen, evidence that at the same time an attempt was made to fire the dwelling-house near it, is competent where the evidence connects defendant with the latter attempt. *Thompson*, 97—496.

In such case it is competent to show threats made by defendant against the son and grandson of the owner of the house. *Ib.*

The objection that there is a failure of proof can not be taken after verdict, nor on motion in arrest of judgment. *Ib.*

Undisputed possession is sufficient proof of ownership. *Ib.*

The prosecutor had two tobacco barns, about fifty yards apart, the one old, the other new, and while the old one was burning defendant was seen standing by the new one, and said to a witness: "You see three men have been watching the barn all day, and it is now burning. You see how good God is; last year it was brother Windsor's barn; this year it is the Boss's, and Windsor ain't got a bit in it." The state, against the objection of defendant, in order to show the *animus* of defendant, was permitted to

show by the prosecutor that he had a barn burned last year in which Windsor had tobacco, and that defendant then lived in forty yards of the barn: *Held*, that the admission of this evidence was error, since, taken in connection with the fact that the solicitor stated that he offered the evidence to show the *animus* of defendant, it was an insinuation that defendant had burned the barn the year before, and comes under the rule which excludes evidence that defendant committed one crime in order to prove another. *Alston*, 94—930.

A witness who is not an expert may give his opinion as to the identity of tracks, and give his reasons for entertaining such opinion. *Reitz*, 83—634.

Evidence that the defendant had made threats, previous to the burning of the barn, that he would do some injury to the son of the prosecutor is competent. *Rhodes*, 111—647.

There was evidence of threats by defendant to do injury to the property of the prosecutor; that on the night of the burning of the barn some one was seen going from the direction of the barn toward the home of the defendant, and that a short time before he had been heard to inquire about a direct way from his house to the vicinity of the building burned, but there was no other evidence to connect him with the crime: *Held*, that there was not evidence sufficient to go to the jury. *Rhodes*, 111—647.

Where the evidence is that the defendant had in his possession bank notes similar to some stolen from the house when the arson was committed, and that he gave contradictory accounts of the manner in which he obtained them, an instruction that these contradictions were evidence to prove that he did not come honestly by them is not erroneous. *Gillis*, 15 (4 Dev.), 606.

The confessions of a prisoner, though without corroboration in any material particular, if believed by the jury, are sufficient to warrant a conviction, and the propriety of giving a caution to the jury to prevent an improper confidence in their truth must be left to the discretion of the presiding judge. *Hardee*, 82—619.

DEFINITION OF OUTHOUSE.—An “*outhouse*” is one that belongs to a dwelling-house situated within the curtilage, and an old building located at a cross-roads and not enclosed in anyway as a dwelling-house, is not an “*outhouse*” within the meaning of the statute. *Roper*, 88—656.

OWNERSHIP OF HOUSE.—The ownership of the house is properly laid in the widow of the deceased owner who has occupied and used it since her husband's death, though there are living heirs, and no dower has been allotted to her. *Gailor*, 71—88.

ARSON, BARN.—A house 17x12, setting on blocks in a stable-yard, having two rooms in it, one quite small, used for storing nubbins and refuse corn to be first fed to the stock, and the other used for storing peas, oats and other products of the farm, is not a barn. *Laughlin*, 53 (8 Jones), 455.

If a prisoner burn a part of a jail merely for the purpose of effecting his escape, and not with the intent to destroy the building, he is not guilty under the statute, but although his main attempt be to escape, yet if he also intends to burn down the building in order to effect his main design, he is guilty. *Mitchell*, 27 (5 Ired.), 350.

PUNISHMENT.—One convicted of burning a gin house can not be sentenced to twenty-five years' imprisonment in the penitentiary. *Dunn*, 86—731.

On conviction of burning a mill, the court may sentence defendant to imprisonment in the penitentiary for a term not less than five nor more than sixty years. *Wright*, 89—507.

(The maximum of punishment is now limited to forty years.)

A house built for, and at one time occupied as, a dwelling-house, but untenanted at the time of the burning, is not a dwelling-house within the meaning of the statute. *Clark*, 52 (*v Jones*), 167.

THE BURNING.—The least burning is sufficient to constitute arson; the charring of the floor to the depth of half an inch is sufficient. *Sandy*, 25 (3 *Ired.*), 570.

ASSAULT.

SEC. 32 (987). Assault. punishment therefor.

SEC. 33. Secret assault with deadly weapon.

SEC. 34. Assault to point firearms at another whether loaded or not.

SEC. 35. Felony joined with assault in indictment.

Sec. 32 (987). Assault, punishment therefor. 1870-'1, c. 43, s. 2. 1873-'4, c. 176, s. 6. 1879, c. 92, ss. 2, 6.

In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: *Provided*, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill, or with intent to commit rape.

WHAT DOES OR DOES NOT CONSTITUTE AN ASSAULT.—Defendant, after using threatening language with reference to the prosecutor and in his hearing, advanced upon him with a knife, continuing the use of violent and menacing expressions, but the evidence left it in doubt whether the knife was open. When defendant got within five or six feet of the prosecutor, the latter said, "I shall have to go away," and withdrew from the work on which he was engaged: *Held*, that defendant was properly convicted of an assault. *Shipman*, 81—513.

The prosecutor and defendant went into defendant's house to make a settlement, and an altercation arising, defendant ordered the prosecutor to leave, which he refused to do, whereupon defendant went to another room, got his gun, and immediately on his return struck prosecutor with it, without attempting to use milder means to expel him, and it did not appear that the prosecutor was armed, or was attempting any violence: *Held*, that defendant was guilty of an assault. *Leggett*, 104—784.

Defendant, being about twenty steps distant, advanced towards the prosecutor with knife and stick, cursing and threatening to do him bodily harm, in consequence of which the prosecutor went into a store and remained until a warrant was obtained, the defendant walking in front of the store saying he would whip the prosecutor if he came out: *Held*, that defendant was guilty of an assault. *Martin*, 85—508.

On indictment for assault, the evidence for the state was that the prosecutor bought a cow from defendant, and after her delivery the prosecutor went out of his store and found that defendant had disengaged the rope, and was driving the cow off. Defendant then went to his crib, got

his gun, and with one barrel cocked and his finger on the trigger, held the gun in his arms, but not pointed towards the prosecutor, and said if any one laid hands on the cow he would blow his brains out. The prosecutor made no attempt to get the cow in consequence of this action, and re-entered his store: (*Held*, that defendant was guilty of an assault, if by his threats, language and acts, he put the prosecutor in fear and caused him to leave sooner than he otherwise would have done, though he did not point the gun at the prosecutor. *Horne*, 92—805.

Where one person, being within striking distance of another, raises a whip and shakes it at the other, saying, "If you were not an old man I would knock you down," it is error to instruct the jury that if the conduct of the assailant was such as to induce a man of ordinary firmness to suppose he was about to be stricken and to strike in self-defence, the assailant would be guilty, since it is not sufficient to constitute an assault that a man of ordinary firmness should *believe* he was about to be stricken; but a proper charge, in such case, would be that if the jury should find that the assailant, at the time he raised the whip, *had not a present purpose to strike*, in law it was not an assault. *Crow*, 23 (1 *Ired.*), 375.

Defendant after being ordered out of the prosecutor's house refused to go, and the prosecutor took hold of him and put him out. While in the yard angry words passed between the parties, and the prosecutor ordered defendant out of the yard; he then went into a lane leading from the house to the road, and while in the lane and when about ten or twelve feet from the prosecutor, picked up a stone and called the prosecutor a horse-thief and used other insulting language. On being ordered out of the lane he said he would go when he got ready, but did not offer to throw the stone: *Held*, that the acts and words of defendant did not make a case of assault, but only a menace of violence. *Milsaps*, 82—550.

The prosecutor took hold of defendant's saddle, claiming it as his own and calling to another for help, when defendant drew his knife saying: "If you don't turn my saddle loose, I'll cut you loose," and started towards the prosecutor, being already in five or six feet of him, and the prosecutor then turned loose the saddle and went away: *Held*, that defendant was not guilty of an assault, since the prosecutor was committing a trespass on defendant's property in his presence and he had a right to use the force necessary for its protection. *Yancey*, 75—244.

If a person be at a place where he has a right to be, and four other persons, having in their possession a manure fork, a hoe and a gun, by following him and by threatening and insulting language, put him in fear and induce him to go home sooner than, or by a different way from what he would otherwise have gone, they are guilty of an assault upon him, though they do not get nearer to him than seventy-five yards, and do not level the gun at him. *Rawles*, 65—334.

If A pursues B with a stick or piece of board, raised in a striking attitude, and is stopped by a third person when within two or three steps of B, this constitutes an assault, though A could not have stricken B with the stick from the place where he was stopped. *Vannoy*, 65—532.

The prosecutor, on approaching a church, was ordered by defendant to go back, but declined to do so, when defendant rose to his feet, saying he had a pistol, placed his hand on the pistol, which was belted around him, and the prosecutor tardily retired; defendant followed a few steps, being not more than ten steps from him, and urged him to go off or he would shoot him, and while he was walking drew his pistol, but did not cock it or present it towards prosecutor: *Held*, that defendant was guilty of an assault. *Church*, 63—15.

The prosecutor was going down the steps which led from the court-room when the defendant, who was before him, in striking distance, stopped,

turned about, clenched his right hand, the arm being bent at the elbow, but not drawn back, and said, "I have a great mind to hit you," whereupon the prosecutor walked away and went down another staircase: *Held*, that defendant was guilty of an assault. Hampton, 63—13.

Defendant intruded upon the premises of the prosecutor, who took hold of him to lead him off, when defendant put his hand in his pocket and partly drew his knife, and thereupon the prosecutor desisted, and went into the house, the defendant cursing him: *Held*, an assault. Marsteller, 84—726.

An offer to strike by one person rushing upon another will amount to an assault, although the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness, under the accompanying circumstances, to believe that he will instantly receive a blow unless he strikes in self-defence. Davis, 23 (1 Ired.), 125.

Where defendant, being within striking distance, raises an axe for the purpose of striking the prosecutor, at the same time saying that if the prosecutor will give up certain property belonging to defendant, which he has seized as an officer by virtue of an execution, he will not strike him, and the prosecutor does give up the property, in consequence of which no blow is given, defendant is guilty of an assault. Morgan, 25 (3 Ired.), 186.

Where a person is obstructed in the exercise of a legal right, or prevented from doing what he proposed to do, and may lawfully do, by a display of physical force, as in brandishing a deadly weapon with violent threats of using it, and this in such proximity as admits of an effectual execution of the menace, in consequence of which such person desists, an assault is consummated. Horne, 92—805.

To constitute an assault there must be a hostile demonstration of violence, which, if allowed its apparent course, would do hurt. Jeffreys, 117—743.

A person who draws an axe on an officer who, having authority to do so by virtue of a warrant, breaks into a house for the purpose of arresting one whom he erroneously believed to be in the house, is guilty of an assault. Mooring, 115—709.

It appeared that the prosecutor, after being ordered from defendant's premises, saw defendant come out, and, by pointing, directed his wife's attention to a certain place near by from which prosecutor inferred that it was the defendant's intention to go there and shoot him, and that, thereupon, prosecutor went home, returned with his gun, and searched for defendant who, before prosecutor discovered his whereabouts, shot at and wounded the prosecutor, who recognized defendant by the flash of the gun: *Held*, that the assault was not made "in a secret manner" within the meaning of the statute. Gunter, 116—1068.

Where an unequivocal purpose of violence is accompanied by an act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose—the battery—is begun and a criminal assault is committed. Reavis, 113—677.

The question whether the defendant had reason to believe that the person attacked intended to assault him is one for the consideration of the jury, and not for the defendant or judge. Harris, 119—861.

Defendants, one with a pistol in his hand, one with a drawn sword, and one with a pistol in his pocket, went to the door of prosecutor's house, where he was sitting, with the admitted purpose of compelling him to leave his home and accompany them to find, and to appear as a witness against, a person for whom they had a warrant, and ordered him to go with them. Defendants were not officers, and had no warrant or subpoena for the prosecutor. The prosecutor ordered the defendants to

leave, but they remained near the door three or four minutes, and in the yard fifteen minutes: *Held*, that defendants were guilty of an assault. *Reavis*, 113—677.

An attempt to appropriate and carry off a crop, raised by a deceased son of the prosecutor as a tenant of the defendant, the landlord, may be repelled by the landlord by force, provided no more force is used than is necessary to protect his possession. *Austin*, 123—749.

It is not sufficient to constitute an assault that a man of ordinary firmness should believe he was about to be stricken; but if it can be collected from the circumstances that, notwithstanding appearances to the contrary, there was not a present purpose to do an injury, there is no assault, and the jury must be the judge of these circumstances. *Crow*, 23 (1 *Ire.*), 375.

ASSAULT ON HUSBAND ON WIFE.—After some words between husband and wife he threatened to leave her, and used to her very improper language, when she started to go off. He caught her by the left arm, and said he would kill her, drawing his knife with the other hand; then, holding her, he struck at her with the knife, but did not strike her, and again drawing back as if to strike, his arm was caught by a bystander; but after all no injury or blow was inflicted: *Held*, that this was a case in which the courts might interfere, and that the husband was guilty of an assault. *Mabrey*, 64—592.

ASSAULT ON SEVERAL.—An indiscriminate assault upon several persons is an assault upon each. *Merritt*, 61 (*Phil. Law*), 134.

OFFER TO STRIKE COUPLED WITH CONDITION.—Where defendant, while standing in his store door, holds a pistol in his hand, sometimes bearing on the prosecutor and sometimes not, and swearing that if the prosecutor comes in he will shoot him, he is guilty of an assault, since an offer to strike with a *deadly weapon* can not be explained by showing that defendant used words at the time which qualified his offer to strike by a condition which he had a right to impose. *Myerfield*, 61 (*Phil. Law*), 108.

DEFINITION.—An assault is an intentional attempt by violence to do an injury to the person of another. *Davis*, 23 (1 *Ired.*), 125.

Sec. 33. Secret assault with deadly weapon. 1887, c. 32.

Any person who shall maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, in a secret manner, with intent to kill such other person, shall be guilty of a felony and punishable by imprisonment in jail or the penitentiary for not less than twelve months nor more than twenty years, or by a fine not exceeding two thousand dollars, or both, in the discretion of the court.

SECRET ASSAULT IN PUBLIC PLACE AND IN PRESENCE OF OTHERS.—This statute embraces assaults made upon one who has no notice of the purpose or presence of the assailant, though it may be in a public place in the presence of others, without any attempt on the part of the assailant to conceal his identity, as well as assaults made by lying in wait, or in such manner as tends to conceal the identity of the assailant. *Jennings*, 104—774.

EVIDENCE SUFFICIENT TO GO TO JURY.—On the question of the identity of defendant as the person who committed the secret assault, the prosecutor testified that he was shot at by some one who was standing behind a fence six feet distant; that the person was a colored boy about the size of the defendant, and was clean shaven; that he could see at that

place fifty yards, and recognized a dark checked shirt which the person was wearing; that on the second morning afterwards, when defendant was brought to trial, he wore a dark checked shirt exactly like the one worn by the person who shot him; that he examined the track next day and found it was made by a No. 7 shoe that had been run down, and that he was acquainted with defendant. The shoe worn by the defendant on the trial was run down, and the justice testified that he placed the shoe given him by the officer in the tracks made at the place of the shooting and it fitted the tracks, and that he afterwards tried it on defendant's foot and it was the same size he wore. Another witness testified that he recognized the shoe exhibited on the trial as the one defendant wore the day before the shooting: *Held*, that the evidence was sufficient to be submitted to the jury. *Telfair*, 109—.

CHARGE.—On indictment for a secret assault with intent to kill there was evidence that defendants were brothers, and that one of them made the assault under cover of darkness and from the bushes; that the other was about 150 yards in the rear, but in sight and armed; that upon the assault being vigorously repelled, the two fell back to a house near by against and from which many shots were fired: *Held*, that it was not error to instruct the jury that if the evidence satisfied them that the defendant who remained in the rear took up the position with the knowledge that his co-defendant was lying in wait with intent to kill, and that his purpose was to afford aid to his brother in case he needed it, that he was guilty as principal of the felonious assault. *Chastain*, 104—900.

NOT A SECRET ASSAULT.—Where one facing another, or walking up in front of him, draws a pistol from a hip pocket, and shoots him without warning, it is not a secret assault. *Patton*, 115—753.

An assault can not be said to have been made in a secret manner except when the person assaulted was unconscious of the presence as well as the purpose of his adversary. *Gunter*, 116—1068.

An assault can not be "secret" in the meaning of the statute unless the person assaulted is unconscious of the presence as well as the purpose of his adversary. *King*, 120—612.

WHAT IS A SECRET ASSAULT.—An assault from behind and in such manner as to prevent the person assaulted from knowing who his assailant is, or that a blow is about to be struck, is a secret assault. *Harris*, 120—577.

INDICTMENT.—It is not necessary that the indictment should contain the words "by waylaying or otherwise," or that it should specify the secret manner in which it was committed. *Shade*, 115—757.

Under an indictment for an assault with intent to kill, charging defendant as principal, he can not be convicted as accessory, though if he was actually present aiding and abetting another to do the act he might be convicted as principal. *Green*, 119—899.

Sec. 34. Assault to point firearms at another whether loaded or not. 1889, c. 527.

It shall be unlawful for any person to point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded.

Any person violating the above section of this act shall be deemed guilty of an assault, and upon conviction of the same shall be fined, imprisoned or both, at the discretion of the court.

Sec. 35. Assault. Felony joined with assault in indictment. 1885, c. 68.

On the trial of any person for rape, or any felony whatsoever, when the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character.

VERDICT FOR SIMPLE ASSAULT, HOW RENDERED.—Where the indictment charges a secret felonious assault, the jury may be instructed that if they find that only a simple assault and battery was committed, they should return a verdict of guilty. In such cases it is suggested, however, that they be directed to return a verdict of "not guilty of the felony charged, but guilty of an assault." Jennings, 104—774.

ASSAULT WITH INTENT TO KILL.

INDICTMENT.—Where a gun is fired at another by one defendant, the other being present aiding and abetting, the indictment may charge the assault to have been made by both. Merritt, 61 (Phil. Law), 134.

The indictment need not state the instrument used by the assailant. Gainus, 86—632.

Where the indictment charges the homicide to have been committed on a day which is yet to come, it is fatally defective. Sexton, 10 (3 Hawks), 184.

EVIDENCE.—On indictment for assault with intent to kill evidence that defendant, a short time before the difficulty took place, said to witness he "would shoot some d—d white livered son-of-a-bitch before he slept," is competent as tending to show the reckless state of defendant's mind at the time. Lawhorn, 88—634.

ASSAULT AND BATTERY.

WHAT CONSTITUTES ASSAULT AND BATTERY.—Where, on indictment for assault and battery, the facts are such that, had the defendant killed the prosecutor, he would be guilty of manslaughter, he is guilty of assault and battery. Leary, 88—615.

A policeman whose duty it is to suppress fights is the judge of the force necessary to be applied, and unless he wantonly or maliciously or unnece-

essarily exercises his power, he is not guilty of an assault and battery in striking a blow, and evidence that the prosecutor persisted in the fight while the policeman had hold of him is evidence of resistance to the officer. Pugh, 101—737.

It is not the belief simply of a man that he is about to be stricken which will justify him in striking first, but his belief founded on reasonable grounds of apprehension. Bryson, 60 (Winst. Law), 86.

One who seeks a fight or provokes another to strike him can not justify returning the blow on the ground of self-defence. Bryson 60 (Winst. Law,, 86.

Where a landlord engaged in collecting his advancements out of a crop in a field that, by agreement with the cropper, was to remain his "till he was reimbursed," on being assaulted by the latter with a deadly weapon, knocks him down with a stick, he is not guilty of an assault and battery. Burwell, 66—661.

Members of a voluntary association, who, in the ceremony of expulsion of a member, according to the rules of the association, suspend a member from the wall by means of a cord fastened around the waist against the consent of the member, are guilty of assault and battery. Williams, 75—134.

Where a trespasser or unwelcome visitor invades the premises of another, armed with a deadly weapon and defiantly stands his ground, the occupant may at once resort to physical force, and the doctrine of *molliter manus* does not apply. Taylor, 82—554.

Evidence that one of the defendants, after ordering the prosecutor out of his father's yard, and his refusal to go, pushed him and that the other struck him with a broom, shows an excess of force which the law does not permit until after gentler means have been employed to remove a trespasser and failed. Burke, 82—552.

A druggist, at the request of a customer, dropped croton oil on a piece of candy which the purchaser gave to another person, and the latter ate the candy so drugged to his serious inconvenience and injury. There was evidence that the druggist knew, or had reason to believe, that the dose was intended for such person, or some one else, as a trick, and not for medicinal purposes: *Held*, that the druggist was guilty of assault and battery. Monroe, 121—677.

One who, by conduct calculated to produce a breach of the peace, provokes an assault, can not defend on the ground of self-defence. Shields, 110—497.

Defendant and the prosecutor, unfriendly for some time, had some words, after which defendant testified the prosecutor followed him, with his hand at his hip pocket as he went to his cart; and that, fearing the prosecutor, and fearful of assault, he then shot him: *Held*, that the court erred in charging the jury that if they believed the evidence, in any aspect, the defendant was guilty. Harris, 119—861.

On indictment for assault and battery in administering a dangerous drug to another it is not necessary that the dose should be a poisonous or deadly one, but only that it should be an unusual dose likely to produce serious results. Monroe, 121—677.

The court charged the jury (1) that, if at M's house, J and L (two of the defendants) got off their horses and advanced upon the prosecutor, cursing him, and with an intention of fighting him, and prosecutor ran, in order to save himself from being beaten, they would be guilty; (2) if they all pursued J to his house with weapons, cursing him and refusing to leave when ordered off by him; and (3) if the jury believe from the evidence, beyond a reasonable doubt, that defendants L and M (two of the defendants) were then present at prosecutor's house telling J what to say

to him, to call him a mill burner, etc., defendants would be guilty: *Held*, that such instructions were proper and authorized, the first two under *State v. Rawles*, 65—3341, and the last by *State v. King*, 86—603, and *State v. Perry*, 5 Jones, 9. Jones, 118—1237.

THE RIGHT OF A JAILER TO WHIP PRISONER.—A jailer who whips a prisoner confined in the jail, with a buggy-whip, in such a manner as to cut the blood out of her arms and back, but not so as to disable her, the places healing up in a week or two, is guilty of assault and battery, though he whipped her because she was singing in a loud and boisterous manner, to the great discomfort of his wife who was very sick and living with him in the jail, and refused to desist from her boisterous conduct when remonstrated with. He had a right to subdue and keep her in subordination by reasonable and proper means, but not to inflict such cruel punishment by beating with a horse-whip. *Roseman*, 108—765.

HUSBAND AND WIFE.—A husband can not be convicted of a battery on his wife unless he inflicts a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness, and it makes no difference that they are living separate by agreement. *Black*, 60 (*Winst. Law*), 266.

Defendant on coming to breakfast one morning intoxicated, began to complain at his wife, threw the coffee-pot and cup into the corner of the room, went out, and returned with two switches, each about four feet long, one about half the size of a man's little finger, the other not so large. He struck his wife five licks with the two switches holding them in both hands, and inflicted bruises on her arm which remained for two weeks, but did not disable her from work. Others interfered and he stopped, saying if they had not been there he would have worn her out: *Held*, that such facts show both malice and cruelty, and the husband was guilty. *Oliver*, 70—60.

A husband whipped his wife with an ordinary switch not larger than the little finger of the usual size of a woman's hand. The whipping was done over her clothing on her back, and was continued for some time, but not more than twenty licks were struck, and was of such violence as to break the skin, raise wheals on her person, and draw the blood so that it came through her clothing so as to be seen on the outside in three or four places; but the wife was not so injured as to prevent her going about as usual: *Held*, that serious damage was done, and the husband was guilty. *Smith, C. J., dissenting. Huntley*, 91—617.

While a wife has the right to fight in the necessary defence of her husband, yet, if she uses excessive force, she is guilty. Where the husband has been slapped in the face and is seized in the collar by the prosecutor, and the wife, while he is thus engaged, cries out "Shoot him! shoot him!" and strikes the prosecutor with a piece of hickory wood twenty inches long and two by four inches thick, with nails driven through the end, some of them extending through the wood, but desists on being seized by the prosecutor, and neither the prosecutor nor the husband attempts to use any weapon, the evidence, under proper instructions, should be submitted to the jury to say whether excessive force was used. *Bullock*, 91—614.

PARENT AND CHILD.—A man living with the mother of a boy as man and wife, though not married to her, is not indictable for whipping the boy for misconduct to such an extent that four days afterward there was a mark on his back the width of a broomstraw, two inches long, where the skin had been broken, and there was some discoloration. *Alford*, 68—322.

A son is not justifiable in fighting for his father when the father and his adversary are engaged in a fight on equal terms. *Johnson*, 75—174.

A parent is not guilty of assault and battery in administering correction to his child, however severe and unmerited it may be, unless it produces

permanent injury, or is inflicted from malicious motives, and not from an honest purpose. Jones, 95—588.

INDICTMENT.—Where the indictment charges a rescue and also an assault and battery, and the verdict is general, if the averments as to the rescue are uncertain and bad, they may be rejected as superfluous and immaterial and the court may pass judgment for the assault and battery. Morrison, 24 (2 Ired.), 1.

An indictment for an assault and battery on a policeman need not aver the official character of the policeman. Belk, 76—10.

An indictment contained two counts, one for assault with a deadly weapon, "with a club," and the other for an assault producing serious damage. On the trial it appeared that no club or deadly weapon was used, that serious injury was inflicted, that the indictment was found within six months after the commission of the offense, and that a justice of the peace had assumed jurisdiction and finally disposed of the case: *Held*, (1) that the description of the instrument in the first count, "a club," *ex vi termini* imputed a deadly weapon; (2) that although the second count was defective in that it did not set out the nature and extent of the injury inflicted, the superior court acquired jurisdiction under the first count; (3) that the trial before the justice was a nullity. Phillips, 104—786.

Where several counts are drawn to meet the different phases of the same transaction, the court will not compel an election. *Id.*

The words "assault and strike" in a warrant are sufficient to charge a simple assault, and such a warrant will support a plea of former acquittal. Price, 111—703.

It is not necessary that a warrant for assault should charge that it was issued upon a sworn complaint. Price, 111—703.

Where the indictment in the superior court charges a deadly weapon, but on the trial the court finds that the instrument used was not a deadly weapon, a plea of former conviction or acquittal in a justice's court should be sustained. Price, 111—703.

A description of an instrument used as "an axe," *ex vi termini*, imparts a deadly weapon. Shields, 110—497.

Where an assault is charged to have been committed with a deadly weapon the *character* of the weapon must be averred. Russell, 91—624.

Where serious damage is alleged the *extent* of the injury must be averred. Russell, 91—624.

Where an indictment, found in October, 1893, charged that on the first day of July, 1893, defendant made an assault with a deadly weapon, to-wit: a rock, knife and brickbat, want of jurisdiction did not appear, for, time not being of the essence of the offence, the charge would have been sustained and the jurisdiction maintained by proof of a simple assault more than one and less than two years from the finding of the indictment. Ridley, 114—827.

OFFICERS.—If a known officer who has two warrants in his hands, the one legal and the other illegal, declare at the time of arrest that he makes the arrest by virtue of the illegal warrant, yet this is not a false imprisonment, for the lawfulness of the arrest does not depend on what he declares, but upon the sufficiency of the authority which he then has. Kirby, 24 (2 Ired.), 201.

An officer has a right to tie his prisoner if he believes it necessary to secure him, and of this necessity he is the judge, yet if he grossly abuse his authority, that is if he does not act honestly from his sense of right, but, under the pretext of duty is gratifying his malice, he is liable to indictment. Stalcup, 24 (2 Ired.), 50.

One who strikes to prevent the taking away of his property by another who seizes it as special constable when no necessity existed for his appointment as such, is not guilty of assault and battery, though he makes no objection at the time to the constable's authority, since the burden is on the state in such case to show that the prosecutor was at the time a lawful officer and had a valid execution. *Briggs*, 23 (3 Ired.), 357.

Where a sheriff has arrested a defendant upon *mesne* process and taken bail, he can not afterwards arrest him on the ground that the bail is insufficient. *Brittain*, 25 (3 Ired.), 17.

A warrant was issued against several persons, one of whom was not arrested, but went before the justice and entered into a recognizance to appear at a future time, and failed to appear, and the justice afterwards reissued the warrant without any special command endorsed thereon: *Held*, that the warrant was *functus officio*, and the person who had entered into the recognizance could not be arrested on it, and was justified in resisting the officer's entrance into her house. *Queen*, 66—615.

If an officer has valid process in his hands and fails to find the accused in the house after breaking the door for that purpose, he does not become a trespasser *ab initio*, although informed by one in the house, before the breaking, that the person whom the officer seeks is not in the house. *Mooring*, 115—709.

A levy made by a constable on a growing crop of corn without going on or near the premises where the corn was growing, will not justify such constable in resisting by force the gathering and carrying away of the corn by a deputy sheriff, who takes it by virtue of a proper levy made by him after the attempted levy by the constable, since the constable's levy was void. *Poor*, 20 (4 D. & B.), 384.

Where a person charged with a misdemeanor escapes and flees, and the officer, while pursuing him, threatens to shoot, and does fire his pistol when within thirty feet of the fugitive, the officer is guilty of an assault, whether his intention was to hit the fugitive or to intimidate and induce him to stop. *Sigman*, 106—728.

A justice's judgment that defendant is guilty of trespass is not void because the warrant fails to state that the trespass was "after being forbidden" or "without license therefor," and is otherwise irregular, when defendant failed to appeal, and defendant can not justify resisting arrest under process issued afterwards to compel him to pay the bill of costs on the ground that such judgment is void. *Dula*, 100—423.

A magistrate's judgment imposing a fine and costs is not discharged by the fact that defendant was permitted to go at liberty on his agreement to pay in ten days, and on his failure to perform his agreement he may be arrested for the fine and costs. *Dula*, 100—423.

The prosecutor, under a special deputation, had executed a warrant for bastardy by arresting the defendant therein; and after the hearing the said defendant was committed to the custody of the prosecutor, and attempted to escape. The prosecutor pursued him, and the defendant in this case, without warning, threw out his foot and tripped the prosecutor, causing him to fall: *Held*, that defendant was guilty of an assault. *Hedrick*, 95—624.

SEAL ON WARRANT BY WHICH DEFENDANT IS ARRESTED.—A seal is essential to a warrant issued by a magistrate for the arrest of a person, and if there be no seal the warrant is void, and the defendant is justified in resisting its execution. *Worley*, 33 (11 Ired.), 242.

LANGUAGE CALCULATED TO BRING ON FIGHT.—Where one person by such abusive language to another as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty, though he may be unable to return the blow. *Perry*, 50 (5 Jones), 9.

Where defendant calls the prosecutor a d—d son-of-a-bitch, and the prosecutor then advances on him with a knife, and defendant shoots to save himself from death or great bodily harm, he is guilty of having used words calculated to bring on the fight unless he retreats as far as he safely can. Lawhorn, 88—634.

WIFE IN PRESENCE OF HUSBAND.—A married woman who commits an assault and battery in the presence of her husband is presumed to act under his constraint, and is not guilty unless the presumption be rebutted by facts showing that she acted voluntarily and without constraint. Williams, 65—398.

BOY UNDER 14.—Although a boy under the age of fourteen can not be convicted for rape, or an assault with intent to rape, or for an ordinary assault and battery, yet if the battery be of an aggravated kind, as if it be a maim, or be done with a deadly weapon, or be prompted by a brutal passion, as unbridled lust, the public justice will interfere and punish, if it appear that the accused was *doli capax*. Pugh, 52 (7 Jones), 61.

TEACHERS.—Teachers are not criminally responsible for the infliction of punishment on their pupils, unless the punishment is such as to occasion permanent injury, or be inflicted merely to gratify malice or evil passion; therefore a teacher is not indictable for whipping a little girl of six years with a switch so as to cause marks on her body which disappeared in a few days. Pendergrass, 19 (2 D. & B.), 365.

On indictment of a teacher for whipping a pupil an allegation that "bruises" were inflicted on the person of the pupil is not a sufficient allegation of serious injury to deprive a justice of jurisdiction. Stafford, 113—635.

Where the defence is set up that the injury was inflicted by a teacher upon his pupil such defence may be invalidated by proof of malice, anger or excessiveness. Stafford, 113—635.

On indictment of a teacher for whipping a pupil it is not necessary that the *quo animo* should be charged. Stafford, 113—635.

A discretionary power in the infliction of punishment upon pupils is confided to teachers, and they will not be held criminally liable unless the punishment results in permanent injury, or be inflicted merely to gratify evil passions. Stafford, 113—635.

If a teacher uses excessive force, or inflicts such punishment upon a pupil as to produce permanent injury, or if he inflicts punishment, not in the honest performance of duty, but, under the pretext of duty, to gratify malice, he is guilty of assault and battery. Long, 117—791.

EVIDENCE.—Evidence of threats made by defendant against the prosecutor prior to the commission of the offence, is inadmissible, since the guilt or innocence of defendant depends altogether on the facts and circumstances immediately connected with the transaction. Norton, 82—628.

Defendant's hogs having been impounded by the town marshal, he proceeded to liberate them by breaking the pound. The marshal came up and ordered him to desist, and, on defendant's refusal to desist, threatened to arrest him and flourished a pistol, whereupon defendant assaulted the marshal with a piece of scantling. The officer had no warrant. The defendant set up that the hogs had been taken under an invalid ordinance: *Held*, that the refusal to admit the town ordinance in evidence for the purpose of showing its invalidity was not error, since the hogs were in the peaceable possession of the officer, and defendant had no right to regain possession by violence. Black, 109—.

Evidence that the prosecutor's brothers had been convicted of the same offence for which defendant is on trial is irrelevant. Burke, 82—551.

Evidence of previous threats of personal violence against defendant by the prosecutor is inadmissible. Skidmore, 87—509.

A wife is not a competent witness against her husband to prove a battery on her person by him, except in case where a lasting injury is inflicted, or threatened to be inflicted upon her. *Hussey*, 44 (Busb.), 123.

A husband is a competent witness against his wife on indictment against her for assault and battery in striking the husband with an axe, since the use of such an instrument indicates malice. *Davidson*, 77—522.

The prosecutrix was assaulted and beaten in the night by a woman disguised as a man, and the state, as a means of identification, was allowed, over defendant's objection, to prove by the prosecutrix that about a week before the assault defendant was at her home disguised as a man, and the prosecutrix there recognized her. Defendant then introduced a witness by whom he proposed to show that he met the prosecutrix and another woman the night after the assault, and that the other woman stated in the presence and hearing of the prosecutrix that the person who committed the assault was unknown: *Held*, that the rejection of this evidence was error. *Burton*, 94—947.

On indictment for an affray, one defendant may be examined as a witness by the state against the other defendant. *Weaver*, 93—595.

In such case it is not error for the court to caution the witness before counsel for the other defendant cross-examines him that he need not tell anything to criminate himself. *Ib.*

Where there is evidence that the correction inflicted by a master upon his apprentice was excessive and cruel, evidence of the bad character of the apprentice, offered to rebut malice, is incompetent. *Dickerson*, 98—708.

A witness can not be impeached by showing that he made declarations concerning the party against whom he testifies showing ill-will and malice unless the witness has first been interrogated as to the declarations. *Ib.*

CHARGE.—The evidence was that a serenading crowd of about twenty persons went to defendant's house at 9 o'clock in the night, and went round the house ringing bells and blowing horns; that guns were fired by the crowd a few times; and that as they were going away defendant fired at the prosecutor, inflicting a serious wound on his leg. Defendant testified that his child, who was sleeping near a window, through which the noise and the flash of the firing was seen, came running to him with blood on her face, caused, as he did not then know, but afterwards learned, by her running against a table, and under the impulse of the moment, believing that she had been shot, he got his gun and went to the door, and seeing the flash of pistols, fired, as he supposed, by the retreating crowd, he fired into the crowd: *Held*, that an instruction which excluded from the jury the consideration as to whether defendant acted under a *reasonable belief* that himself or family was in immediate danger, was erroneous. *Nash*, 88—618.

It is error for the court to instruct the jury that if the witness "did strike the defendant, and that defendant drew his pistol in *self-defence*, although he did not cock it or point it at witness, it would amount to an excessive use of force," since the same act can not be in self-defence and also an excess of force. *Jones*, 77—520.

Where the error assigned is that the trial judge laid down an abstract principle of law which had no connection with the case, in a way prejudicial to defendant, but the case on appeal does not show to what the exception relates, the court will refuse to consider it. *Gardner*, 94—953.

The court has a right to explain to the jury the difference between positive and negative evidence, and an illustration to explain the difference is not prejudicial, when the jury is expressly told that it is given merely as an explanation, and that they must determine the fact according to the weight they see fit to give the evidence. *Ib.*

It is error for the court to instruct the jury "that in passing on the credibility of a witness they shall consider that it is a rule of law, a presumption that men testify truly and not falsely." Jones, 77—520.

It is error for the court, on indictment of a police officer for using excessive force in making an arrest, to fail to call the attention of the jury to the good faith in which the officer claims to have acted. McNinch, 90—695.

PUNISHMENT.—Imprisonment in jail for five years and a recognizance of \$500 to keep the peace for five years after the expiration of the term of imprisonment, imposed on a defendant for whipping his wife with such severity as to leave the marks for two or three weeks, is "cruel or unusual punishment," within the prohibition of Const. N. C., art. 1, section 14. Driver, 78—423.

A fine of \$100 imposed on a jailer for whipping a prisoner with a buggy-whip in such a manner as to cut the blood out of her arms and back, but not to disable her, the places healing up in a week or two, is not excessive, and is clearly within the discretion of the court, since the injury inflicted was serious. Roseman, 108—765.

Where the court adjudges that defendant be fined and imprisoned, and the fine is paid and part of the imprisonment undergone, it can not, even at the same term, recall and suspend the judgment, nor can the court at a subsequent term sentence him again for the same offence. Warren, 92—825.

Imprisonment in jail for six months is excessive and unwarranted punishment of one convicted of a simple assault and battery upon a person who was acting as a special policeman at the time, but whose appointment was unwarranted, there being no evidence that there was any unusual demand for his appointment within the meaning of the act authorizing the mayor to appoint special policemen. Holmes, 118—1201.

A sentence of two years on the roads is not excessive punishment on conviction for an aggravated assault with a deadly weapon. Haynie, 118—1265.

ASSEMBLY—UNLAWFUL.

See Riot.

ASYLUM.

Sec. 36 (2255). Criminals confined in jail found to be insane, to be sent to an asylum; order granted by judges of the superior court. 1883, c. 156, s. 16. 1891, c. 15, s. 12.

The judges of the superior court, in their respective districts, shall commit to the proper asylum, if there be room therein, as a patient, any person who may be confined in jail, on a criminal

charge of any kind or degree, or upon a peace warrant, whenever the judge shall be satisfied by the verdict of a jury of inquisition that the alleged criminal act was committed while such person was insane, and that such insanity continues; and also any person acquitted upon a criminal charge, where, on the trial of such person, insanity was relied upon as a defence: *Provided*, the fact of insanity was found as a distinct issue to exist at the time of such trial, or is so found by a jury of inquisition as such judge may direct. A copy of such finding in any of the above cases shall accompany the committal. *Provided further*, that nothing in this section shall be construed as giving priority of admission to any asylum or hospital to any insane criminal or person acquitted of crime upon the ground of insanity, or is unable by reason of insanity to conduct his defence, over other classes of insane persons. In case any person shall be committed to any asylum or hospital under this section because of inability to make a legal defence to the indictment by reason of insanity shall thereafter recover sanity, it shall be the duty of the superintendent and the board of three directors provided for in section twenty-two hundred and sixty of The Code to certify the fact of such person's sanity to the solicitor of the proper district, who shall thereupon take proper steps to secure the appearance of such person to answer the original indictment.

ATTEMPT TO COMMIT CRIME.

An indictable attempt to commit a crime is such an intentional preliminary guilty act as will apparently result in a deliberate crime. Brown, 95—685.

The acts constituting the alleged attempt should be set forth in the indictment. Brown, 95—685.

On indictment for an attempt to commit burglary, some overt act of defendant, which in the ordinary course of things would result in the commission of the crime, must be alleged and proved. Colvin, 90—717.

An attempt to commit a felony, some act being done amounting to an attempt to accomplish the purpose without doing it, is a misdemeanor. Jordan, 75—27.

An indictment charging an attempt to kill by administering a poisonous drug, and an attempt to produce an abortion by the same means, is not demurrable for a misjoinder, since both offences are misdemeanors at common law of the same grade. Slagle, 82—653.

ATTORNEYS.

See also ARGUMENT OF COUNSEL—COMMENTS OF COUNSEL.

SEC. 37 (26). Attorney not to be debarred, except, etc.

SEC. 39 (110). Clerk not to act as attorney.

SEC. 38 (27). Justices not to practice law

SEC. 40 (38). Clerks forbidden to practice law.

Sec. 37 (26). Attorney not to be debarred except, etc. 1870-'1, c. 216, s. 4.

No person who shall have been duly licensed to practice law as an attorney shall be debarred or deprived of his license and right so to practice law, either permanently or temporarily, unless he shall have been convicted, or in open court confessed himself guilty of some criminal offence, showing him to be unfit to be trusted in the discharge of the duties of his profession, and unless he shall be debarred according to the two preceding sections and the succeeding section.

CONFESSION MUST BE VOLUNTARY.—The admission of an attorney that he wrongfully retains his client's money, such admission being made in answer to a rule to show cause why he should not be attached for contempt in failing to pay the money into court in obedience to an order of court, is not a confession "in open court" within the meaning of this statute, since the admission is not voluntary, as when one is charged on indictment and confesses in open court, and besides, to allow his answer to the rule to be used as a confession to establish guilt would be objectionable as a means to compel him to criminate himself on oath. *Kane v. Haywood*, 66—1.

STATUTE CONSTITUTIONAL.—This statute is constitutional, and a judge has no right to debar an attorney, who has never been convicted of a criminal offence, nor confessed such in open court, from practicing his profession simply because such attorney published an article concerning the judge which he considers libellous. The respondent in such case might "try himself," or he might join issue as to the facts and justify by showing the truth of the allegations contained in the article for which he was held in contempt. *Ex parte Schenck*, 65 N. C., 353.

Sec. 38 (27). Justices not to practice law. 1870-'1, c. 90. 1883, c. 406.

It shall not be lawful for any attorney at law or justice of the peace to practice law as an attorney in any of the judicial courts held for the county wherein they hold the office of county commissioner or justice of the peace. And any person offending against this section shall be guilty of a misdemeanor, and, upon conviction, be fined at the discretion of the court not less than two hundred dollars; and by the judgment of the court may be dismissed from the practice of law as an attorney, and be removed from the office of justice of the peace.

The fact that a justice of the peace acted as attorney in only one case, there being no evidence that he received or charged any fee, or held himself out to the public as an attorney, or that he appeared in any other case, is not sufficient to justify an instruction that if the jury believe the evidence defendant is guilty, though that fact is some evidence to be submitted to the jury to be considered by them in determining whether he practiced law within the meaning of the statute. Bryan, 98—644.

FOREIGNERS UNNATURALIZED.—Unnaturalized foreigners can not be licensed as attorneys in this state. *Ex parte* Thompson, 10 (3 Hawks), 355.

Sec. 39 (110). Clerk not to act as attorney, etc C. C. P., s. 424.

No clerk or any partner or person connected in law business with him shall act as counsel or attorney at law in the county wherein he is clerk; and any one violating this provision shall be guilty of a misdemeanor.

Sec. 40 (28). Clerks of courts forbidden to practice law 1871-'2, c. 120, s. 1. 1880, c. 43.

It shall not be lawful for any deputy or assistant clerk of the superior court clerk of any county to practice law as an attorney in any of the judicial courts held for the county in which he performs the duty of a deputy or assistant clerk as aforesaid. Any person offending against this section shall be guilty of a misdemeanor, and be fined at the discretion of the court, not less than two hundred dollars.

BAIL.

See also RECOGNIZANCES.

SEC. 41. Any person may execute mortgage in lieu of bond; proviso.

SEC. 42. Sheriff to take bail in bailable offences; not to become bail himself.

SEC. 43. Court to allow bail pending appeal.

SEC. 44. When bail shall be allowed.

SEC. 45. Who may take bail of persons not imprisoned.

SEC. 46. Who may take bail of persons imprisoned.

SEC. 47. When a prisoner is bailed the recognizance to be filed with clerk.

SEC. 48. Bail may arrest and surrender principal before final judgment; bail not thereby discharged after recognizance forfeited.

SEC. 49. Persons surrendered may give other bail; sheriff allowing a release to be amerced and indicted.

SEC. 50. Sheriff or other officer may take bail.

SEC. 51. Matter of defence good for principal good for bail.

Sec. 41 (120.) Any person may execute mortgage in lieu of bond; *proviso*. 1874-'5, c. 103, s. 3. 1891, c. 445.

Any person required to give a bond or undertaking, or required to enter into a recognizance for his appearance at any court, in any criminal proceeding, or for the security of any costs or fine in any criminal action, may also execute a mortgage on real or personal property of the value of such bond or recognizance, payable to the state of North Carolina, conditioned as such bond or recognizance would be required, with power of sale, which power shall be executed by the clerk or justice of the peace in whose court said mortgage shall be executed, upon a breach of any of the conditions of said mortgage: *Provided*, that where such mortgage upon real property is executed before a justice of the peace the power of sale shall be enforced by the clerk of the court of the county in which the criminal proceeding is had: *And provided further*, that no such mortgage on real property executed for the security for costs or fines shall allow a longer time for payment of said costs or fine than six months from the execution thereof, and no mortgage on personal property a longer time than three months, except in cases of appeal, when the time allowed shall be counted from the date of the final decision in the cause: *And provided further*, that all legitimate expenses of sale, which shall only be made after due advertisement according to law, shall be paid out of the proceeds of the sale of the mortgaged property, as shall also the following fees, to-wit, for each sale of real property mortgaged under this section the clerk shall receive two dollars, and for each sale of personal property mortgaged under this section the clerk or justice of the peace who enforces the power of sale shall receive one dollar.

Sec. 42 (1180). Sheriff to take bail in bailable offences; not to become bail himself. R. C., c. 35, s. 11. 1797, c. 474, s. 4.

When any sheriff or his deputy shall arrest the body of any person, in consequence of the writ of *capias* issued to him by the clerk of a court of record on an indictment found, the said sheriff or deputy, if the crime is bailable, shall recognize the offender, and take sufficient bail in the nature of a recognizance for his appearing at the next succeeding court of the county where he ought to answer, which recognizance shall be returned with the *capias*; and the sheriff shall in no case become bail himself.

Sec. 43 (1181). Court to allow bail pending appeal. R. C., c. 35, s. 12. 1850, c. 2.

When any person convicted of a misdemeanor, and sentenced by the court, shall appeal, the court shall allow such person to give bail pending appeal.

Sec. 44 (1156). When bail shall be allowed. 1868-'9, c. 178, sub chap. 3, s. 25.

If the offence with which the prisoner is charged be bailable, and the prisoner offer sufficient bail, such bail shall be taken and the prisoner discharged; if no bail be offered, or the offence be not bailable, the prisoner shall be committed to prison.

Sec. 45 (1160). Who may bail persons charged with crime but not imprisoned. 1868-'9, c. 178, sub chap. 3, s. 29. 1871-'2, c. 37.

Officers before whom persons charged with crime, but who have not been committed to prison by an authorized magistrate, shall be brought, shall have power to take bail as follows:

(1) Any justice of the supreme court, or a judge of a superior court, or of a criminal court, in all cases.

(2) Any justice of the peace or chief magistrate of any incorporated city or town, in all cases of misdemeanor, and in all cases of felony not capital.

Sec. 46 (1161). Who may let to bail persons charged with crime and in prison. 1868-'9, c. 178, sub chap. 3, s. 30.

Any justice of the supreme court or any judge of a superior court or of a criminal court, shall have power to bail persons committed to prison charged with crime in all cases; any justice of the peace or chief magistrate of any incorporated city or town shall have the same power, in all cases where the punishment is not capital.

Sec. 47 (1162). When a prisoner is bailed, the recognizance taken by the officer shall be filed with the clerk of the court 1868-'9, c. 178, sub chap. 3, s. 13.

Whenever any prisoner shall be bailed by any officer under the preceding section, such officer shall immediately cause the recognizance taken by him to be filed with the clerk of the court of the county to which the prisoner is recognized.

Sec. 48 (1230). Bail may arrest and surrender principal before final judgment; bail not thereby discharged after recognizance forfeited. R. C., s. 5. 1777, c. 115, s. 20. 1848, c. 7.

The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued or to the sheriff having such process to return, during the session, or in the recess of such court, the principal, in discharge of himself; and such bail shall, at any time before such execution awarded, have full power and authority to arrest the body of his principal, and secure him, until he shall have an

opportunity to surrender him to the sheriff or court as aforesaid; and the sheriff is hereby required to receive such surrender, and hold the body of the defendant in custody, as if bail had never been given: *Provided*, that, in criminal proceedings, the surrender by the bail, after the recognizance forfeited, shall not have the effect to discharge the bail, but the forfeiture may be remitted in the manner provided for.

SURETIES ON BAIL-BOND MAY ARREST PRINCIPAL.—The sureties on a bail-bond for the appearance of a defendant in a criminal case in the United State District Court of another state may arrest their principal in this state, or they may appoint an agent to make the arrest or assist them in doing so. Lingerfelt, 109—.

The right of the sureties to arrest the principal is not extinguished because the recognizance is declared forfeited by the default of the principal to appear, and a *scire facias* ordered. Lingerfelt, 109—.

Sec. 49 (1231). Persons surrendered may give other bail; sheriff allowing a release liable to be amerced and indicted. R. C., c. 11, s. 6 1827, c. 40.

Any person surrendered in the manner specified in the preceding section, shall have liberty, at any time, before final judgment against him, to give bail; and in case of such surrender, the sheriff shall take the bail-bond or recognizance to the succeeding court; and in case the sheriff shall release such person without bail, or the bail returned be held insufficient, on exception taken the same term to which such bail-bond shall be returned, and allowed by the court, the sheriff, having due notice thereof in criminal cases, shall forfeit to the state the sum of one hundred dollars, to be recovered on motion in like manner as forfeitures for not returning process, and be subject to be indicted for misdemeanor in office; and it shall be the duty of the prosecuting officer to collect the forfeiture; and, in case of a release, the sheriff shall be liable for an escape, and may be prosecuted and punished as provided for in the chapter entitled "Crimes and Punishments."

Sec. 50 (1232). Sheriff or other officer having prisoner in custody may take bail. R. C., c. 11, s. 8.

If any person for want of bail shall be lawfully committed to jail at any time before final judgment, the sheriff or other officer having him in custody, may take sufficient justified bail and discharge him; and the bail-bond shall be regarded, in every respect, as other bail-bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken.

A justice of the peace has no power to allow a defendant in a criminal action to give bail during the postponement of his examination, and a bond or recognizance so taken is void. Jones, 100—438.

(This is changed by act of 1889, c. 133, s. 299.)

Sec. 51 (1233). Matter of defence which is good for principal is good for bail. R. C., c. 11, s. 9.

Every matter which would entitle the principal to be discharged from arrest, may be pleaded by the bail in exoneration of his liability.

BASTARDY.

SEC. 52. Justices have exclusive jurisdiction; warrant on complaint of woman or affidavit of county commissioners.

SEC. 53. Proceedings; warrant issued for woman; warrant for putative father; issue of paternity; appeal.

SEC. 54. On appeal parties and witnesses recognized; putative father making default, issue to be tried.

SEC. 55. Judge or justice may continue case; defendant to be recognized for appearance.

SEC. 56. Fine \$10; allowance not to exceed \$50.

SEC. 57. Examinations in three years.

SEC. 58. Execution may issue for maintenance.

SEC. 59. Putative father may be committed to house of correction, or apprenticed.

SEC. 60. Illegitimate children may be legitimized.

SEC. 61. Effects of legitimization.

Sec 52 (31). Justices of the peace to have exclusive original jurisdiction; warrant issued upon complaint of woman or affidavit of county commissioners. 1879, c. 92, s. 2. 1879, c. 116.

Justices of the peace of the several counties shall have exclusive original jurisdiction to issue, try and determine all proceedings in cases of bastardy in their respective counties. A warrant in bastardy shall be issued only upon the voluntary affidavit and complaint of the mother of the bastard; or, upon the affidavit of one of the county commissioners, setting forth the fact that the bastard is likely to become a county charge.

Sec. 53 (32). Proceedings; warrant issued for woman; warrant for putative father; issue of paternity; appeal, etc. R. C., c. 12, ss. 1, 4. 1741, c. 30, s. 10. 1799, c. 531, s. 2. 1832, c. 10. 1832, c. 17. 1850, c. 14. 1879, c. 92, s. 2. 1879, c. 116.

When complaint is made on affidavit by one of the county commissioners as set forth in the preceding section, to any justice of the peace of the county in which the woman resides, that any single woman within his county is big with child, or delivered of a child or children, he may cause her to be brought before him, or any other justice of the county, to be examined upon oath respecting the father; and if she shall refuse to declare the father, she shall pay a fine of five dollars, and give a bond payable to the state, with sufficient surety, to keep such child or children from being

chargeable to the county, otherwise she shall be committed to prison until she shall declare the same, or pay the fine aforesaid and give such bond; but if such woman shall, upon oath, accuse any man of being the father of such child or children, or if proceedings have been instituted upon her own affidavit and complaint, she shall accuse any man of being the father of such child or children, the justice shall cause him to be brought before some justice of the peace of such county to answer the charge; and, if he shall, upon oath, deny that he is the father of such child or children, the justice shall proceed to try the issue of paternity, and if it shall be found that he is the father of the child or children, or if he shall not deny upon oath that he is the father of the child or children, then he shall stand charged with the maintenance thereof, as the court may order, and shall give bond with sufficient surety, payable to the state, to perform said order, and to indemnify the county where such child or children shall be born, from charges for his or their maintenance, and may be committed to prison until he find surety for the same, and shall be liable for the costs of the issue or proceeding, and from the judgment and finding, the affiant, the woman, or the defendant, may appeal to the next term of the superior court of the county where the trial is to be had *de novo*. And upon the trial of the issue, whether before the justice or at term, the examination of the woman, as aforesaid, taken and returned, shall be presumptive evidence against the person accused, subject to be rebutted by other testimony which may be introduced by the defendant; and if the jury at term, shall find that the person accused is the father of the child or children, then the judge shall make the order for the maintenance and for costs of proceeding, and shall take bond from the defendant and his sureties for the maintenance of the child or children, and to indemnify the county, and pay the costs; and in default thereof, may imprison the defendant. If the putative father shall escape or be in any other county, out of the jurisdiction of such justice issuing the warrant, it shall be issued, indorsed, executed and returned as provided in warrants in criminal actions.

EVIDENCE.—Where defendant testifies that he has never had sexual intercourse with the mother, evidence that she had criminal intercourse with another man about the time when in the course of nature the child must have been begotten, and that such intercourse was habitual, is admissible. Britt, 78—439.

Where defendant denies the paternity and introduces evidence that the prosecutrix had sexual intercourse with another man about the time the child must have been begotten, evidence that the child resembles such man is admissible. Britt, 78—439.

Where the prosecutrix testifies that the defendant is the father of the child, which the defendant denies, and on cross-examination she testifies that she never had intercourse with any other man, the fact thus brought out on cross-examination is collateral, but evidence offered by defendant that she had intercourse with other men, at or about the time the child was begotten, is admissible to impeach her. Perkins, 117—698.

The issue in bastardy is the paternity of the child, and whatever tends to prove or disprove the affirmative of this issue is competent; and, therefore, evidence that another than the defendant had intercourse with the prosecutrix about the time the child was begotten is competent. Warren, 124—.

Where the mother is a married woman she is not a competent witness to prove the non-access of her husband. Pettaway, 10 (3 Hawks), 625.

A child born in wedlock is presumed to be legitimate, and when it is shown that the husband might have begotten it, the presumption is conclusive, but this presumption may be rebutted by proof of facts and circumstances showing that the husband could not have been the father, and the wife is a competent witness to prove these facts. McDowell, 101—734.

Evidence of the bad character of the woman for truth may be given by defendant, though she has offered no evidence except her examination or affidavit. Pearson, J., *dissenting*. Floyd, 35 (13 Ired.), 382.

The child may be exhibited to the jury for them to see whether its features resemble the alleged father. Woodruff, 67—89.

While evidence that the prosecutrix had sexual intercourse with persons other than the defendant about the time the child was begotten is competent, yet where the prosecutrix, upon her examination, denies such intercourse, the matter being collateral, her answer is conclusive. Parish, 83—613.

Where the prosecutrix is asked if she had not had sexual intercourse with another person than defendant and denies it, her answer is conclusive and can not be contradicted. Patterson, 75—157.

Defendant has a right to show that the child does not resemble him. Bowles, 52 (7 Jones), 579.

Evidence that the putative father was impotent at the time the child is alleged to have been begotten is competent. Hargett, 69—411.

Where a witness, in reply to a question, denies being the keeper of a bawdy house the answer is conclusive and can not be contradicted by hearsay evidence as to the bad character of the witness. Cagle, 114—835.

BASTARDY—CHILD OF MARRIED WOMAN PRESUMED TO BE LEGITIMATE.—A child born in wedlock is presumed to be legitimate, and this presumption can only be removed by proof of impossibility of access or impotency of the husband. Rose, 75—239.

If a child be born in wedlock it is legitimate by presumption of law, though the birth takes place within a month or a day after marriage, and where the mother was visibly pregnant at the time of the marriage the child is presumed to be the offspring of the husband. Herman, 35 (13 Ired.), 502.

If a married woman have a child born by an adulterous intercourse in violation of the rights of matrimony, the nuptial state of the woman does not prevent the law from pronouncing the child a bastard; it only raises a presumption that the child is legitimate. Pettaway, 10 (3 Hawks), 623.

The fact that the mother of the alleged bastard was married, only raises a presumption that the child is legitimate. Peebles, 108—768.

WHEN THE PRESUMPTION CONCLUSIVE.—A child born in wedlock is presumed to be legitimate, and unless it is born under such circumstances

as to show that the husband could not have begotten it, the presumption is conclusive. McDowell, 101—734.

MOTHER OF BASTARD PRESUMED TO BE SINGLE.—It is not necessary that a bastardy proceeding should show affirmatively that the mother of the bastard was a single woman, as that fact will be presumed. Peebles, 108—768.

AFFIDAVIT PRESUMED TO BE VOLUNTARY.—Where it appears that the affidavit upon which a warrant for bastardy issued was sworn to before a justice of the peace by the mother, it will be presumed to have been voluntarily made. Peebles, 108—768.

WRITTEN EXAMINATION OF PROSECUTRIX IN A BASTARDY PROCEEDING.—It is not error for the court to charge the jury in a bastardy proceeding that "the written examination of the woman was presumptive evidence that the defendant was the father of the child, and that it devolved on him by a preponderance of evidence to show that he was not, and that, if taking all the evidence into consideration, both sides were evenly balanced, the state was entitled to a verdict." Rogers, 79—609.

EFFECT OF THE WRITTEN EXAMINATION OF THE WOMAN.—Effect is given to the examination without reference to the misconduct or reputation of the woman making it, since the very cause discloses the want of virtue. Giles, 103—391.

It is not error to charge that illicit intercourse with others, even when approaching a habit, does not, unconnected with other evidence tending to show the falsehood of the charge, rebut the presumption given by the statute to the examination of the woman. Giles, 103—391.

The legal presumption is not rebutted by proof that just nine months previous to the birth of the child, the prosecutrix had illicit intercourse with another man, and that on one occasion, about that time, they were caught in the act. Bennett, 75—305.

NO APPEAL BY STATE OR PROSECUTRIX.—Neither the state nor the prosecutrix can appeal from a verdict of not guilty. Ballard, 122—1024.

An acquittal by a justice of the peace is final, since the defendant can not be twice put in jeopardy. Ostwalt, 118—1208.

The clause allowing an appeal by the "affiant or the woman" is unconstitutional. Neither the state nor the woman can appeal. Ostwalt, 118—1208.

LIMITATION OF ACTION.—A proceeding in bastardy is barred only after the lapse of three years, and is not controlled by section 1177 of The Code. Hedgepeth, 122—1039.

PUNISHMENT.—The justice, in the exercise of the police power, may sentence defendant for a term exceeding thirty days, and the ordinary limit in criminal cases does not apply. Nelson, 119—797.

If imprisonment is imposed the limit must be fixed with a view to securing the payment of the fine, allowance and costs, and a sentence of twelve months at hard labor, where defendant was in default only for a fine of \$10 and an allowance of \$50 was excessive. Nelson, 119—797.

OATH AND EXAMINATION OF WOMAN.—Notwithstanding the fact that the oath and examination of the mother are presumptive evidence against defendant, yet, if the defendant denies the paternity and contradicts the testimony of the prosecutrix, the matter is put at large, and the jury must be satisfied beyond a reasonable doubt of the defendant's guilt. Rogers, 119—793.

The oath and examination of the woman is *prima facie* evidence of defendant's guilt, and the burden is on him to exonerate himself from the charge. Mitchell, 119—784.

The term "*prima facie*" is synonymous with "presumptive" as used in the statute. Mitchell, 119—784.

Making the oath and examination of the mother "presumptive" evidence against the accused is a valid exercise of legislative power. Rogers, 119—793.

DEFENDANT MAY WAIVE CONSTITUTIONAL RIGHT.—The defendant in bastardy proceedings may waive his constitutional right to be confronted with his accuser, and where, on appeal from a justice, the oath and examination of the woman is offered, the defendant will be deemed to have waived such constitutional privilege when he does not in express terms insist on the bodily presence of the prosecutrix on the witness stand, and a general objection to the evidence is not sufficient. Mitchell, 119—784.

Where defendant fails to demand an opportunity to confront and cross-examine the prosecutrix at the time her written examination is offered he waives his right to subsequently object to the evidence on the ground that he was not offered such opportunity. Rogers, 119—793.

JURISDICTION.—A justice of the peace has jurisdiction of bastardy proceedings commenced by the voluntary affidavit of the mother. Mize, 117—780.

A justice of the peace has exclusive jurisdiction for twelve months, and after that time the superior and criminal courts have concurrent jurisdiction. Wynne, 116—981.

THE JUDGMENT VALID.—The judgment committing defendant "until he find surety" is valid, though conditional. Wynne, 116—981.

ALLOWANCE CONSTITUTIONAL.—The provision for the allowance to the mother is not unconstitutional as authorizing imprisonment for debt. Wynne, 116—981.

WHEN OFFENCE COMPLETE.—The offence of bastardy is complete when the child is begotten. Wynne, 116—981.

FATHER NOT ENTITLED TO EXEMPTION.—The father of a bastard child is not entitled to the exemption of \$500 as against the allowance to the mother. Parsons, 115—730.

DISCHARGE OF DEFENDANT AS AN INSOLVENT.—The father of a bastard child, committed for non-payment of the fine, costs and allowance, is entitled to be discharged from prison upon filing his petition as an insolvent and complying with the requirements of the law. Parsons, 115—730.

Where the mother, in answer to defendant's petition to be discharged as an insolvent, raises an issue of fraud as to her allowance, a judge of the superior court has no power to make, at chambers, in a county other than that where the issue is pending, any order prejudicial to the mother's rights without her consent. Parsons, 115—730.

As to the allowance to the mother of a bastard child, the mother can suggest fraud in answer to defendant's petition to be discharged from prison as an insolvent, and upon such suggestion, an issue is raised, which should be entered upon the trial docket of the superior court and stand for trial as other causes. Parsons, 115—730.

As to the fine and costs, only the state can suggest fraud in answer to the defendant's petition to be discharged as an insolvent. Parsons, 115—730.

The mother of a bastard child to whom an allowance has been made is a creditor of the father, permitting her to oppose the insolvent's discharge by a suggestion of fraud. Parsons, 115—730.

The defendant in a bastardy proceeding was placed in custody until the fine, allowance and costs were paid, and was committed to jail by the sheriff under this order. He remained there for 20 days and was then

discharged under sections 2967 and 2972 of The Code, and at a subsequent term was sentenced to the house of correction under above section: *Held*, (1) that placing defendant in custody was, by necessary implication, an order to imprison upon failure to pay the fine, allowance and costs; (2) that defendant was properly discharged; (3) that the sentence to the house of correction was erroneous. *Burton*, 113—655.

An instruction that the jury may convict if the evidence "satisfied" them of defendant's guilt is insufficient and erroneous. *Rogers*, 119—793.

WHAT COUNTY HAS JURISDICTION.—Although a bastard be born in one county, yet if the mother and child afterwards remove to another county, and there acquire a residence before proceedings in bastardy are had against her, those proceedings must be in the latter county which is alone responsible for the maintenance of the bastard. *Jenkins*, 34 (12 Ired.), 121.

Where a pregnant woman goes to another county, and is there delivered of her child, and she then returns with it to her native county, the justices of her native county have jurisdiction of the case. *Roberts*, 32 (10 Ired.), 350.

The county of the mother's settlement and not that of her domicile is chargeable with the maintenance of the child, and a settlement is gained only by a continuous residence of twelve months. *Elam*, 61 (Phil.), 460.

Where the mother, having lived in one county for several years, removed to another county two or three months before the birth of her child, with a *bona fide* intention of changing her domicile, the former and not the latter county has jurisdiction of proceedings to charge the putative father. *Elam*, 61 (Phil.), 460.

One convicted of bastardy can not be allowed to take the oath of insolvency without remaining in prison for twenty days, and neither the judge nor solicitor can consent to such discharge. *Bryan*, 83—611.

AMENDMENT.—An affidavit in a bastardy proceeding may be amended in the superior court even after the defects are pointed out by a motion to dismiss. *Giles*, 103—391.

FORMER JUDGMENT.—A former proceeding in bastardy which was dismissed for want of jurisdiction is no bar to a second proceeding for the same offence. *Giles*, 103—391.

Where the mother has paid the fine and given bond to indemnify the county, on her refusal to declare the father, she can not afterwards institute proceedings against the putative father to have him charged with the maintenance of the child. *Brown*, 46 (1 Jones), 129.

Where the mother refuses to declare the father, pays the fine and executes the bond required by law, she can not afterwards sue out a warrant for the putative father on the ground of alleged collusion between him and the justice who took the bond. *Price*, 81—516.

Where the mother, after judgment has been rendered in her favor and defendant has given bond to indemnify the county, releases the defendant from the payment of the sum allowed her, such release is a bar to another action by her for the sum due her. *Ellis*, 34 (12 Ired.), 264.

EITHER PARTY MAY APPEAL.—A proceeding in bastardy being a civil suit, either party has a right to appeal. *Crouse*, 86—617. Overruled. *Ostwalt*, 118—1208.

AFFIDAVIT VOLUNTARY.—Where an inspection of the affidavit shows that it was sworn out by the woman before a justice of the peace, an exception that it did not appear that the affidavit was voluntary, can not be sustained. *Peeples*, 108—768.

AFFIDAVIT NEED NOT STATE THAT THE MOTHER IS A SINGLE WOMAN.—It is not necessary that the affidavit should state that the mother is a single

woman, since if she is married that is a matter of defence and only then to the extent of raising a presumption that the child is legitimate. Peeples, 108—768.

WARRANT.—It is not necessary that the warrant should conclude "against the form of the statute." Peeples, 108—768.

CHARGE.—Where the judge inadvertently refers to the proceeding as an "indictment," the error, if any, is cured by his correcting it in another part of the charge. Williams, 109—.

A charge that if the oral testimony offered by the prosecution and the defendant, taken together, "left the minds of the jury in doubt, then the presumption raised by the written examination would not be rebutted and the defendant would be guilty," is correct. Williams, 109—.

PAYMENT NO BAR.—A payment to the mother by the putative father in full satisfaction for the maintenance of the child is no bar to a subsequent action in bastardy, though such payment may very properly influence the court in saying what further sums he shall pay. Harshaw, 20 (4 D. & B.), 371.

ALLOWANCE NOT PAID BY COUNTY.—The court has no right to adjudge that the allowance to the mother of a bastard child shall be paid by the county because the father takes the insolvent debtor's oath and is discharged. Bryan, 83—611.

COUNTY LIABLE FOR COSTS OF THE STATE, WHEN.—Where the putative father of a bastard child takes the insolvent debtor's oath, and is discharged, the county is liable for costs of the state, but not for the solicitor's fees nor the costs of the defendant. Bryan, 83—611.

Sec. 54 (33). Upon appeal parties and witnesses to be recognized; putative father making default, issue to be tried. R. C., c. 12, s. 3. 1799, c. 531, s. 1.

When an appeal shall be taken as provided for in the preceding section, the justice shall recognize the woman, and the person accused of being the father of the child or children, with sufficient surety, for the appearance of such woman and putative father at the next term of the superior court for the county, and to abide by and perform the order of the court; said justice shall also recognize the witnesses to appear at said superior court, and shall return to said court the original papers in the proceeding and a transcript of his proceedings, as required in other cases of appeal. If the putative father fails to appear, unless for good cause shown, the judge shall direct the issue of paternity to be tried, and if the issues be found against the person accused, he shall order a *capias* or attachment to be issued for the father, and may also enter up judgment against the father and his surety upon his recognizance.

Sec. 55 (34). Upon issue of paternity, judge or justice to continue the case if he sees fit until woman is delivered: in the meantime to recognize defendant with surety for his appearance. R. C., c. 12, s. 2. 1741, c. 30, s. 11. 1799, c. 531, s. 2. 1850, c. 14.

When the judge or justice trying the issue of paternity, as the case may be, shall deem it proper, he may continue the case until

the woman shall be delivered of the child; but when a continuance is granted, the court shall recognize the person accused of being the father of the child with surety for his appearance either at the next term of the court or at a time to be fixed by the justice granting the continuance, which shall be after the delivery of the woman.

Sec. 56 (35). Fine to be ten dollars, and allowance not to exceed fifty dollars. 1879, c. 92, s. 2.

When the issue of paternity shall be found against the putative father, or when he admits the paternity, he shall be fined by the judge or justice not exceeding the sum of ten dollars, which shall go to the school fund of the county, and the court shall make an allowance to the woman not exceeding the sum of fifty dollars, to be paid in such installments as the judge or justice shall see fit, and he shall give bond to indemnify the county as prescribed in section thirty-two; and in default of such payment he shall be committed to prison. .

Sec 57 (36). Examinations to be taken within three years after birth. R. C., c. 12, s. 6. 1814, c. 871, s. 1.

All examinations upon oath to charge any man with being the father of a bastard child, shall be taken with in three years next after the birth of the child, and not after.

Sec. 58 (37). Execution may issue for maintenance. R. C., c. 12, s. 7. 1799, c. 531, s. 3.

When the judge or justice shall charge the father of a bastard child with its maintenance, and the father shall neglect to pay the same, then the judge or justice, notice being served on the defendant at least ten days before the return day stated in the notice, or such notice being returned by the sheriff or constable that the defendant is not to be found, may order an execution against the goods, chattels, lands and tenements of the father, for such sum as the court shall adjudge sufficient for the maintenance of the bastard child: *Provided*, that the party aggrieved by such non-payment shall apply for the same.

Sec. 59 (38). In certain cases putative father may be committed to house of correction, or instead thereof apprenticed. 1866-'67, c. 10.

In all cases arising under this chapter, when the putative father shall be charged with costs or the payment of money for the support of a bastard child, and such putative father shall, by law, be subject to be committed to prison in default of paying the same, it shall be competent for the court to sentence such putative father

to the house of correction for such time, not exceeding twelve months, as the court may deem proper: *Provided*, that such person or putative father, at his discretion, instead of being committed to prison or to the house of correction, may bind himself as an apprentice to any person whom he may select, for such time and at such price as the court may direct. The binding shall be by indenture in open court; and the price obtained shall be paid to the county treasurer. On the indenture being signed by the presiding judge of the court and by the master receiving such apprentice, the person thus bound shall be treated and regarded as an apprentice in all matters, except education.

Sec. 60 (39). *Illegitimate children may be legitimated by superior court at term.* R. C., c. 12, s. 8. 1829, c. 19, s. 1.

The putative father of any illegitimate child may apply by petition in writing, to the superior court of the county in which the father may reside, praying that such child may be declared legitimate; and if it shall appear that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimated; and the clerk shall record the decree.

Sec. 61 (40). *Effects of such legitimation; legitimate in all respects as to father.* R. C., c. 12, s. 9. 1829, c. 19, s. 3

The effect of such legitimation shall extend no further than to impose upon the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only, his real estate, and also to entitle such child to the personal estate of his father, in the same manner as if he had been born in lawful wedlock; and in case of death and intestacy, the real and personal estate of such child shall be transmitted and distributed according to the statute of descents and distribution, among those who would be his heirs and next of kin, in case he had been born in lawful wedlock.

BAWDY AND DISORDERLY HOUSES.

WHAT CONSTITUTES A BAWDY-HOUSE.—A bawdy-house is not the habitation of one lewd woman, but the common habitation of prostitutes; a brothel, and one woman can not be indicted for keeping a bawdy-house merely because she is unchaste, lives by herself, and habitually admits one, or many, to an illicit cohabitation with her. Evans, 27 (5 Ired.), 603.

Evidence that defendant's daughter had given birth to a bastard child, and on one occasion had been seen in bed with a man in defendant's

house; that on another occasion defendant was seen in bed with a man, and her daughter at the same time in another room in bed with another man, and that on still another occasion the defendant was discovered near a public road in the act of illicit sexual intercourse close to her house, is not sufficient to warrant a conviction either for keeping a bawdy-house or a disorderly house. Calley, 104—858.

TOWN ORDINANCE.—Under a general power in a charter to suppress houses of ill fame, a city may pass an ordinance forbidding owners to rent houses for the purpose of being used as bawdy-houses, or with a knowledge that they will be so used by the lessee; but its authorities are not thereby empowered to define what is a house of ill fame, or declare a given house to be a bawdy-house, or to enact that the permitting of prostitution by the owner or occupant of any house therein shall constitute such owner or occupant the keeper of a house of ill fame. Webber, 107—962.

EVIDENCE.—Evidence that the female members of a witness' family were not permitted, on account of the character of the house, to pass by it on their way to Sunday-school, is properly left to the jury as some evidence of annoyance. Robertson, 86—628.

DISORDERLY HOUSE.—On indictment for keeping a disorderly house, the evidence was that the house was within a few feet of a public highway and a place where liquors were sold and drank and near a distillery; that lewd behavior by defendant's daughter had been seen at various times, and that she had given birth to a bastard child; that there were frequent firing of guns on the premises both night and day, and that the house was a resort for men of bad repute, and had been annoying to eight or ten families in the immediate neighborhood, and was so offensive that women would not pass the place unattended: *Held*, that a request for an instruction that all the evidence did not establish the character of the house as disorderly was properly refused. Wilson, 93—608.

Defendant lived in the country, remote from any public road, and loud noises and uproar were often kept up by his five sons when drunk, but he did not encourage them, except by getting drunk himself, but would sometimes endeavor to quiet them, and only two families in a thickly settled neighborhood were disturbed by the noises: *Held*, that defendant was not guilty. Wright, 51 (6 Jones), 25.

A keeper of a saloon who permits promiscuous assembling about his shop of persons who cause disturbance by loud noises, quarrelling and swearing, such disturbance being the probable consequence of his conduct, is guilty of keeping a disorderly house. Thornton, 44 (Bus.), 252.

Permitting a man's slaves to meet and dance on his premises on Christmas or other holiday, even though other slaves with the permission of their masters participate in the enjoyment, and though some of the younger members of the owner's family occasionally join in the dance, does not constitute the offence of keeping a disorderly house or any other offence. Boyce, 32 (10 Ire.), 536.

One who entertains strangers only occasionally, although he receives pay for it, is not an inn-keeper; and if on such occasions gambling, drinking and fighting take place, he is not indictable as the keeper of a disorderly house, for it is not the common nuisance. Mathews, 22 (2 D. & B.), 424.

A disorderly house is one kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by. Wilson, 93—608.

INDICTMENT.—An indictment which charges that defendant kept an "ill-governed" house is sufficient without charging in words that it was a "disorderly house," nor is an omission to charge that it was "to the common nuisance" fatal. Wilson, 93—608.

BIGAMY.

Sec. 62 (988). Bigamy, what and how punished. 9 Geo. IV, c. 31, s. 22. R. C., c. 34, s. 15. 1790, c. 323. 1809, c. 783. 1829, c. 9.

If any person being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina, or elsewhere, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of felony, and imprisoned in the penitentiary or county jail, for any term not less than four months nor more than ten years; and any such offence may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offence had been actually committed in that county: *Provided*, that nothing herein shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time, nor shall extend to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage, nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

VARIANCE IN THE NAME OF FIRST WIFE.—Where the indictment alleges that the first wife's name was Dixie Marshall; and there is evidence that her name was Lee Emma Dixie Marshall, and also evidence that she was known as Dixie Marshall, it is not error for the court to charge that there is no variance if the jury find that she "was known as Dixie Marshall and was so known and acknowledged and married by defendant." Davis, 109—.

EVIDENCE.—Evidence that defendant was advised that his first marriage was void for want of a license, and that he married a second time, believing such to be the case, is properly rejected. A license only relieves the minister or justice performing the ceremony from the penalty, and is not necessary to the validity of the marriage, and ignorance of the law could not excuse defendant. Robbins, 28 (6 Ired.), 23.

MARRIAGE SOLEMNIZED BY OFFICER DE FACTO SUFFICIENT.—It is not necessary for the state to show that the magistrate who solemnized the first marriage "was duly appointed and qualified," but it is sufficient to prove that such justice was at the time a *de facto* officer. Davis, 109—.

OMISSION OF JUSTICE'S NAME IN JOURNALS OF THE LEGISLATURE.—The fact that the name of the justice who solemnized the first marriage does not appear in the journals of the legislature among the justices elected by that body is not sufficient to show even that he was not an officer *de jure*, since justices, in certain cases, are appointed by the governor and also by the clerk of the superior court. Davis, 109—.

BURDEN ON DEFENDANT TO SHOW WANT OF MENTAL CAPACITY.—Where want of mental capacity at the time of the second marriage is relied on

as a defence, the burden is on the defendant to satisfy the jury, but not beyond a reasonable doubt, that he had not sufficient mental capacity to know right from wrong. Davis, 109—.

SECOND WIFE A COMPETENT WITNESS.—The second wife is a competent witness either for or against the husband. Patterson, 24 (2 Ired.), 346.

CARNAL KNOWLEDGE NOT NECESSARY.—Consummation by carnal knowledge is not necessary to the validity of a marriage. Patterson, 24 (2 Ired.), 346.

NAME OF FIRST WIFE NEED NOT BE GIVEN.—It is not necessary that the indictment should give the name of the first wife at all. Davis, 109—.

EXHIBITING LICENSE.—Where eye-witnesses testify to the marriage and a certified copy of the marriage license filled up by the justice who married the defendant is in evidence, it is not error for the court to instruct the jury that if the "license was exhibited to the justice it would be presumed that the ceremony was regular and fulfilled the requirements of the law," the exception being that there was no evidence that the license was exhibited to the justice. Davis, 109—.

MARRIAGE OF THOSE WHO WERE FORMERLY SLAVES.—Where a marriage between persons who were formerly slaves is proven to have taken place in 1857, followed by cohabitation, the fact that no consent to such marriage has been given since emancipation, or since the act of 1866, c. 40, validating such marriages, and requiring such persons to acknowledge such cohabitation before the clerk of the county court and an entry of the acknowledgment to be made, does not invalidate such marriage nor prevent either of such persons from being convicted of bigamy in marrying another afterwards. Whitford, 86—636.

Where persons were married while slaves and continued to live together as husband and wife after the abolition of slavery, they were, by virtue of chapter 40, laws 1866, legally married and no acknowledgment before an officer was necessary. Melton, 120—591.

The admission by defendant of his former marriage is competent against him, though such statement may have referred to the relations which he and his former wife sustained to each other as man and wife in slavery times. Melton, 120—591.

Where one witness testified that defendant had been married to his first wife thirty-nine years and had admitted two years before the trial that he had another wife living, and it appeared that the defendant had testified on the preliminary examination before a justice of the peace to such first marriage while he and she were slaves, it was proper to refuse an instruction that, on the evidence, the jury could not convict. Melton, 120—591.

INDICTMENT.—An indictment for bigamy need not contain an averment that the defendant had not been divorced from his first wife, since that is a matter of defence. Melton, 120—591.

ADMISSION OF FIRST MARRIAGE.—The first marriage may be proved by the admission of the defendant, or by circumstantial evidence. Wylde, 110—500.

CONSTITUTION—SECOND MARRIAGE.—That part of the statute which attempts to constitute a second, or bigamous, marriage in another state without the subsequent living together of the parties a crime in this state is unconstitutional. Cutshall, 110—538.

FIRST WIFE COMPETENT WITNESS.—The first wife of the defendant is a competent witness to prove the marriage, public cohabitation as man and wife being public acknowledgment of the relation and not coming within the nature of the confidential relations which the policy of the law forbids either to give in evidence. Melton, 120—591.

74 BIGAMY—BILL OF PARTICULARS—BLACKMAILING.

RECORD OF MARRIAGES.—The record of marriages for the county is admissible to prove a marriage. Melton, 120—591.

LICENSE ADMISSIBLE.—The original marriage license signed by the justice solemnizing the marriage is admissible to prove a marriage, though neither the justice nor the witnesses attesting the certificate as being present at the marriage are present in court. Melton, 120—591.

JURISDICTION.—It is the second marriage while the first wife is living that constitutes the crime of bigamy; and when such second marriage takes place in another state, the courts of this state can not take jurisdiction of the offence. Barnett, 83—615.

SUFFICIENT ALLEGATION OF FIRST MARRIAGE.—An indictment which alleges that defendant, being a married man, did marry a certain person during the life of his first wife, he well knowing at the time of the second marriage that his first wife was living, and he not having been divorced from her, is sufficient. Davis, 109—.

NOT NECESSARY TO NEGATIVE DIVORCE FROM FIRST WIFE.—It is not necessary in an indictment for bigamy to negative a divorce from the first wife. Davis, 109—.

BILL OF PARTICULARS.

Where the indictment does not convey sufficient information to enable the defendant to prepare for his trial he may apply to the prosecuting officer for a bill of particulars, and if refused he may apply to the court to direct that a bill of particulars be furnished. Brady, 107—822.

Where an indictment otherwise unobjectionable is not sufficiently specific as to the nature of the charge, and the defendant fails to demand a bill of particulars before trial, after conviction the court will not arrest the judgment for such objection. Shade, 115—757.

If the offence charged is not set out as clearly as defendant wishes he is entitled to a bill of particulars, but no indictment will be quashed or judgment arrested for trivial defects. Pickett, 118—1231.

BLACKMAILING.

Sec. 63 (989). Blackmailing by accusation, threatening letter or other threats. R. C., c. 34, s. 110.

If any person shall knowingly send or deliver any letter or writing demanding of any person, with menaces, and without any reasonable or probable cause, any chattel, money or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing, accusing or threatening

to accuse any person of any crime punishable by law with death, or imprisonment in the penitentiary, with a view or intent to extort or gain from such person any chattel, money, or valuable security, every such offender shall be guilty of a misdemeanor.

If it is deducible by necessary implication from the whole tenor of the letter, that defendant threatened to indict the prosecutor for a criminal offence punishable by imprisonment in the penitentiary, with a view and intent to extort money, an indictment setting out the letter will not be quashed. Harper, 94—936.

BLASPHEMY.

See NUISANCE—PROFANE SWEARING.

BOATS.

Sec. 64 (3711). Obstructing boats by felling trees, etc., a misdemeanor. R. C., c. 100, s. 6. 1795, c. 460, s. 2.

If any person shall obstruct the free passage of boats by felling trees, or by any other means whatever, he shall be guilty of a misdemeanor.

Sec. 65. Boats, unlawful to anchor on private oyster grounds. 1891, c. 516.

It shall be unlawful for any person, or persons, to anchor any boat or vessel on any private oyster bed or ground where oysters are planted: *Provided*, said oyster beds or grounds have been staked off with a sufficient number of stakes all around said bed or grounds to indicate the locality of the same and one or more sign-boards are posted up on said bed or ground with the words thereon in large Roman letters, "Private oyster grounds, planted": *Provided further*, that there are good anchoring grounds near said oyster beds, or grounds, that are not planted.

Any person violating the provisions of the above section shall be guilty of a misdemeanor and fined not less than ten dollars nor more than fifty dollars, or be imprisoned not less than ten days nor more than thirty days.

BONDS.

See BAIL.

BRIBERY.

SEC. 66. Bribery of jurors.

SEC. 68. Offering a bribe.

SEC. 67. Bribery; officers receiving bribes.

Sec. 66 (990). Bribery of jurors, R. C. c. 34, s. 34. 5 Edw. III., c. 10. 34 Edw. III., c. 8. 38 Edw. III., c. 12.

If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a state prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by his verdict, shall be guilty of an infamous crime, and imprisoned in the penitentiary or county jail not less than four months nor more than ten years.

Sec. 67 (991). Bribery; officers receiving bribes, guilty of felony. 1868-'9, c. 176, s. 2.

Any person holding office under the laws of this state, who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing, or omitting to perform, any official act, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, shall be guilty of a felony, and punished by imprisonment in the penitentiary for a term not exceeding five years, or fined not exceeding five thousand dollars, or both, in the discretion of the court.

Sec 68 (992). Bribery; offering a bribe punished. 1870-'1, c. 232.

Any person offering a bribe, whether it be accepted or not, shall be guilty of felony, and punished by imprisonment for a term not less than one year nor more than five years in the penitentiary or county jail, in the discretion of the court.

BRIDGES.

SEC. 69. Misdemeanor to demolish or injure bridges.

SEC. 70. Owners of mills and ditches to keep up bridges.

SEC. 71. Penalty for neglect.

SEC. 72. Toll bridges allowed, to be kept in repair.

Sec. 69 (993). Bridges; misdemeanor to demolish, break or injure. 1883, c. 271.

If any person shall unlawfully and wilfully demolish, destroy, break or tear down, injure or damage any bridge across any of the creeks or rivers or other streams in the state, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court.

Sec. 70 (2036). Owners of mills and ditches on and across roads to keep up bridges; provisos. R. C., c. 101, s. 24. 1817, c. 941, s. 1. 1846, c. 95, s. 1. 1881, c. 290. 1887, c. 261.

It shall be the duty of every owner of a water-mill, which is situate on any public road, and also of every person who, for the purpose of draining his lands, or for any other purpose, shall construct any ditch, drain or canal across a public road, respectively, to keep at his own expense in good and sufficient repair, all bridges that are or may be erected or attached to his mill-dam, immediately over which a public road may run; and also to erect and keep in repair all necessary bridges over such ditch, drain or canal on the highway, so long as they may be needed by reason of the continuance of said mill, or mill-dam, ditch, drain or canal: *Provided*, that nothing herein shall be construed to extend to any mill which was erected before the laying off such road, unless the road was laid off by the request of the owner of the mill: *Provided further*, that the duty hereby imposed on the owner of the mill, and on the person cutting the drain or canal, shall continue on all subsequent owners of the mill, or other property, for the benefit of which the said ditch, drain or canal was cut: *Provided also*, that when any ditch or drain originally constructed across any public road, and bridged for the convenience and safety of the traveling public, has been or may hereafter be enlarged by the owner of adjacent lands to drain his lands, it shall be the duty of such owner to keep up and in repair all bridges crossing such ditch, drain or canal, and that such charge shall be imposed upon all subsequent owners of the lands so drained, and that any person throwing a bank of dirt in the main road shall be compelled to spread the same: *Provided also*, that when any ditch or drain is

cut in such way as to turn water into any public road the person cutting such ditch or drain shall be compelled to cut such other ditch or drain as may be necessary to take the water from said road.

Sec. 71 (2037). Penalty for neglect. R. C., c. 101, s. 25. 1817, c. 941, s. 2. 1876-'7, c. 90. 1876-'7, c. 211.

Every person, who shall fail to perform the duties imposed upon him by the preceding section, or shall leave out of repair any such bridge, for the space of ten days, unless prevented by unavoidable circumstances, shall be liable for such damages as may be sustained, and moreover shall be guilty of a misdemeanor, and fined not exceeding fifty dollars.

An indictment against an individual for permitting a public bridge to become ruinous, which he is bound to repair, must set forth *how* he became subject to the duty of making repairs. King, 25 (3 Ired.), 411.

A person who contracts with the county to keep a bridge in repair is indictable for neglect of that duty. Crowell, 4 (Taylor's Term Rep.), 683.

A proprietor of a mill, who cuts a canal across a public road, whereby the passage along the highway is obstructed, and those who are in possession of the mill claiming under him and using the canal, are liable to an indictment for such obstruction, the one for creating and the other for continuing the nuisance. But if a bridge is erected over a canal neither is indictable for simply suffering the bridge to be out of repair. Yarrell, 34 (12 Ired.), 130.

Sec. 72 (2045). Toll-bridges allowed by board of commissioners, when; builders to keep them in repair, or forfeit toll and be indicted. R. C., c. 101, s. 26. 1784, c. 227, s. 7. 1817, c. 939, s. 2. 1817, c. 940, s. 3.

Whenever, from the rapidity or width of any stream, it may be too burdensome to build and keep up a bridge across the same, at the expense of those who are taxable for that purpose, the board of commissioners of the county, or counties, chargeable therewith, may jointly and severally (as the case may be) contract for the building thereof, by allowing the builder to take tolls, at such rate and for such time, on all persons, horses, carriages, and other things passing over the bridge, as may be agreed on between the board of commissioners and the builder; which tolls shall be common to all persons. And such bridges shall be built in the manner the board or boards may direct, and shall be kept in good repair by the builder, his heirs and assigns, during the time the tolls are to be enjoyed; and in default of complying with the contract, the builder, or others who may succeed to his rights and enjoy the tolls, shall be guilty of a misdemeanor.

It is not the duty of the commissioners of a county to take the *initial* steps for repairing the bridges thereof when they fall into decay; it is only when their co-operation becomes necessary in a movement *started*

by the township board of trustees or supervisors of public roads for such repairs, and is withheld without legal excuse, or they refuse to provide means to meet the contract, that they are criminally answerable for such breach of official duty. Selby, 83—617.

BUGGERY.

See CRIME AGAINST NATURE—RAPE.

BURGLARY.

SEC. 73. Degrees and punishment. SEC. 75. Breaking into certain houses.
SEC. 74. Breaking out of dwelling in SEC. 76. The intent to commit.
night time.

Sec. 73 (994). Burglary; degrees and punishment. 1870-'1, c. 222. 1889, c. 434.

There shall be two degrees in the crime of burglary as defined at the common law and in section nine hundred and ninety-five of The Code of North Carolina. If the crime be committed in a dwelling-house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling-house or sleeping apartment at the time of the commission of said crime, it shall be burglary in the first degree. Second. If the said crime be committed in a dwelling-house or sleeping apartment not actually occupied by any one at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling-house or in any building not a dwelling-house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of said crime, it shall be burglary in the second degree.

Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death; and any one so convicted of burglary in the second degree shall suffer imprisonment in the state prison for life, or for a term of years, in the discretion of the court.

When the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of guilty of burglary in the second degree if they deem it proper so to do.

INDICTMENT.—It is not necessary that the indictment should contain an averment that the offence was committed since the act creating the different degrees, where the proof shows that the offence was subsequent to the act. Following *State v. Halford*, 104 N. C., 874, and distinguishing *State v. Wise*, 66 N. C., 120. *Fleming*, 107—905.

Where the indictment charges, and the evidence proves, that the burglary was committed "on the 11th day of November, A. D., 1888," it sufficiently appears that the offence was committed before the act was amended (laws 1889, c. 434, ratified March 11, 1889), to enable the court to determine whether the punishment ought to be under the old statute or the statute as amended, and the judgment will not be arrested. Distinguishing *State v. Wise*, 66 N. C., 120, and *State v. Massey*, 97 N. C., 465. *Halford*, 104—874.

An averment that the breaking was with intent to commit larceny is supported by proof that the entry was made with a purpose to commit robbery, since to rob implies to steal by force. *Ib.*

DEGREE.—The jury are not permitted to return a verdict of burglary in the second degree "if they deem it proper so to do," making the verdict independent of all evidence, but one charged with burglary in the first degree may be convicted of the second degree if the evidence establishes that grade of the crime. This is in analogy to a verdict of manslaughter on indictment for murder. *Fleming*, 107—905.

Where the indictment charges the offence as in the old form without alleging that the dwelling-house was in the *actual* occupation of any one at the time of the commission of the crime, the defendant can not be convicted of burglary in the first degree, but may be convicted of burglary in the second degree. *Fleming*, 107—905.

INDICTMENT.—An allegation that the breaking and entering were with intent to steal is supported by proof of an intent to rob, since robbing includes larceny, and on indictment for a robbery, defendant may, if the evidence justifies it, be acquitted of the robbery and convicted of larceny. *Cody*, 60 (*Winst. Law*), 197.

An indictment for burglary for breaking into the house of a husband need not charge the house to be the property of the husband and wife jointly on account of the wife's right of dower and homestead, since the wife has no estate in the husband's land during his life. *Wincroft*, 76—38.

An allegation that defendant "having so burglariously as aforesaid broken and entered said dwelling-house * * * then and there, on the said S, in the said dwelling-house then and there being, unlawfully, maliciously, secretly and feloniously did make an assault with a deadly weapon * * * and him, the said S, did shoot * * * with intent him, the said S, * * * then and there feloniously, of his malice aforethought to kill and murder," etc., is a good and sufficient count for burglary. *Johnston*, 119—883.

THE INTENT.—Where the breaking and entry is with intent to commit a felony, the prisoner is guilty, though after entering he desists from an attempt to commit the felony through fear or because he is resisted. *McDaniel*, 60 (*Winst. Law*), 249.

The fact that the prisoner, after breaking in the house, entered a room where a young lady was sleeping and grasped her ankle, without any attempt at explanation when she screamed, is some evidence of an entry with intent to commit rape, and is properly submitted to the jury. *Boon*, 35 (13 *Ired.*), 244.

The fact that defendant entered the dwelling of the prosecutrix at about 10 p. m., after the inmates had retired, and fled when discovered, is some evidence that he entered with intent to steal. *Haynes*, 71—79.

WHAT CONSTITUTES A BREAKING.—Where a person entices the owner to

leave his house and go to a neighbor's house by giving a false alarm of fire at the neighbor's, and the owner leaves his door unfastened and his family neglect to fasten it after his departure, and such person, after about fifteen minutes, enters the house through the unfastened door, without any breaking, with intent to commit a felony, he is not guilty of burglary, since to constitute a constructive breaking by enticing the owner out of his house by fraud and circumvention, the entry must be immediate, or in so short a time that the owner or his family has not opportunity of refastening the door. Ruffin, C. J., *dissenting*. Henry, 31 (9 Ired.), 463.

Defendants went to the storehouse of the prosecutor in which he was sleeping, between 10 and 11 o'clock at night, and, knocking at the door, called his name twice, he answered the call, and told them to wait until he could put on his clothes, which he did and opened the door, when the defendants entered the house and called for meat, and as the prosecutor was in the act of getting the meat he was knocked down by one of the defendants and the store robbed: *Held*, to be sufficient breaking to constitute burglary. Mordecai, 68—207.

Where the entrance is obtained by a conspiracy with an apprentice living in the house, it is a constructive breaking. Rowe, 98—629.

An entry, at night, through a chimney, into a log cabin, in which the prosecutrix dwelt, and stealing goods therefrom, constitutes burglary, though the chimney, made of logs and sticks, is in a state of decay, and not more than five and a half feet high. Pearson C. J., *dissenting*. Willis, 52 (7 Jones), 190.

Upon the trial of an indictment for burglary, the proof tended to show that the felonious entry was made either through a window, the blinds of which were closed but not fastened, or through a door which had been bolted, and the court charged the jury that "in order to constitute a breaking * * * it is not necessary that the inmates of the house should have resorted to locks and bolts. If the blinds and door were held in their position by their own weight, and, in that position, relied upon by the inmates as a security against intrusion, it is a sufficient fastening;" *Held*, to be correct. Fleming, 107—905.

Where a prisoner in the night time knocked at the door of a dwelling, and on being challenged from within, gave his name in a feigned voice as a friend, and thus obtained immediate entrance and committed robbery, he is guilty of burglary. Johnson, 61 (Phil.), 186.

HOUSE IN WHICH BURGLARY MAY BE COMMITTED.—A log cabin belonging to the owners of a tobacco factory in which the superintendent of the factory usually slept is a dwelling-house of the owners. Jake, 60 (Winst. Law), 80.

SMOKE-HOUSE.—A smoke-house, opening into the yard of a dwelling-house, and used for its ordinary purposes, is in law a dwelling-house in which burglary may be committed. Whit, 49 (4 Jones), 349.

It is not burglary to break and enter a smoke-house thirty-five steps from a dwelling-house, the dwelling-house having no enclosure around it. Jake, 60 (Winst. Law), 80.

STORE.—A store in which a clerk has his regular sleeping apartment, although he sleeps there for the sole purpose of protecting the premises, is a dwelling-house of the owner of the store. Outlaw, 72—598.

A store in a room of which a person is employed to sleep solely for the protection of the premises, such person not being a member of the family nor a servant of the prosecutor, is not a dwelling-house. Potts, 75—129.

A storehouse, thirty yards distant from the prosecutor's dwelling-house and within the same enclosure, in which the prosecutor had slept for

five months to protect his store and for the convenience of trade, is a dwelling-house in which burglary can be committed. Mordecai, 68—207.

A storehouse in which a clerk habitually sleeps in a bed-room therein, is a dwelling-house in which burglary may be committed, though the clerk sleeps in there only for the purpose of protecting the property. Williams, 90—724.

A storehouse, 250 yards from the dwelling, to which there is no chimney, in which there is no bed or bedstead, but in which the owner sometimes sleeps twice a week, and at other times not once in two weeks, is not a dwelling-house. Jenkins, 50 (5 Jones), 430.

It is not burglary to break into a store situate within three feet of a dwelling-house and enclosed in the same yard, since burglary can only be committed in a dwelling-house, or such outbuildings as are necessary to it *as a dwelling*. Taylor, C. J., *dissenting*. Langford, 12 (1 Dev.), 253.

Where the clerk sleeps in the store the fact that he does not "board" with the owner is immaterial. Presley, 90—730.

A burglary may be committed in a storehouse twenty-four yards from dwelling-house, and separated from it by a fence, where the storekeeper and servant of the owner frequently slept in the house through the fall. Wilson, 2 (1 Hay.), 242 (279).

Burglary may be committed in a store standing twenty-four yards from the dwelling and separated therefrom by a fence, if the owner or his servants sometimes sleep therein. Wilson, 2 (1 Hay.), 279.

OUTHOUSE.—An outhouse seventeen and a half feet from the dwelling and used with it is within the curtilage. Twitty, 2 (1 Hay.), 102 (118).

If an outhouse be so near the dwelling-house that it is used with it, as appurtenant to it, burglary may be committed in it. Twitty, 2 (1 Hay.), 118.

BURGLARY IN FIRST DEGREE.—Where the evidence shows that the house in which the crime is committed was actually occupied at the time, a conviction of burglary in the second degree is not authorized, since a felonious entry under such circumstances is made burglary in the first degree by the statute. Johnston, 119—883.

The court could not charge that if "all the evidence was that the family was in the house at the time of the burglarious entry, the defendant would be guilty of burglary in the first degree," because the credibility of such evidence, though uncontradicted, is for the jury. Alston, 113—666.

MAY BE CONVICTED OF LARCENY.—Where the charge is burglariously entering and stealing defendant may be convicted of the larceny and acquitted of the burglary. Grishom, 2 (1 Hay.), 17.

Upon indictment for burglary there may be a conviction for larceny. Grishom, 2 (1 Hay.), 13 (17).

WHETHER ENTRY IN THE NIGHT.—Where defendant admits the breaking with felonious intent, and the evidence is that the breaking was "after daylight down," and that it was "dark, except the light of the moon," the evidence is sufficient to warrant the finding of the jury that the offence was committed in the night time. McKnight, 111—690.

There is no presumption of law arising from any fact that a felonious breaking into a dwelling was committed in the night time rather than the day; and before a defendant can be convicted of burglary this fact must be proved either directly or indirectly. Whit, 49 (4 Jones), 349.

POWER OF THE JURY.—The jury are not vested with the discretionary power as to the degree for which they should convict, but they must find according to the evidence as they believe the facts to be. Alston, 113—666.

ERROR IN FAVOR OF DEFENDANT.—The defendant can not assign as error an instruction that the jury might, in their discretion, find the defendant guilty of burglary in the second degree, "although the family was in the house at the time of the entry," since he can not except to an error favorable to himself. *Alston*, 113—666.

CONFESSION.—After arresting a person charged with burglary and conveying to the preliminary trial, the officer said to the prisoner: "If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you." The prisoner answered: "I am not guilty." After the investigation and while being conducted to the jail by the same officer the prisoner made a confession: *Held*, that such confession was inadmissible as evidence on the trial, since it may have proceeded from the inducement held out to him by the officer when on the way to the magistrate's office. *Drake*, 113—624.

OTHER BURGLARIES.—It is not competent to show that other burglaries were committed in the same neighborhood about the same time as the one with which defendant is charged was committed. *Smarr*, 121—669.

OWNERSHIP OF HOUSE, SERVANT.—The indictment charged that defendant entered the dwelling-house of A & B, partners, and the proof was that the house was occupied by A & B who were partners in the jewelry business; that A furnished the house and his personal labor and B furnished the capital, the profits to be divided between them, and that C who was an apprentice of A and a member of his family, was also a clerk to the partnership and slept in the house: *Held*, that the house was properly described as the dwelling-house of A & B, since C, who slept in the house, was the servant of the firm. *Davis*, 77—490.

WIFE'S SEPARATE PROPERTY.—An indictment for burglary charging the larceny of a quilt which is the separate property of the wife, may properly charge the quilt to be the property of the husband, since a husband has a special property as bailee in the wife's separate personal estate which is in common use by them. *Wincroft*, 76—38.

EVIDENCE.—Evidence that the prosecutor discovered in the morning between daylight and sunrise that his house had been broken into, that the house was situated on a public street in a town, and that a box and chair had been so arranged as to form steps which enabled the person breaking to reach the window, is sufficient to be submitted to the jury for them to say whether the breaking and entry were made in the night time. *McDonald*, 73—346.

Where it is proved that a burglary has been committed by a number of persons, and there is also evidence that the prisoner was present at the commission of the offence, evidence that the prisoner belongs to a band of renegades encamped in the community about the time, is competent, as forming a link in a chain of circumstances connecting him with the crime. *Bill*, 51 (6 Jones), 34.

It is competent for the state to show acts and conversations of the defendant which tend to fix him with a knowledge of the location of the premises and the condition and circumstances of the prosecutor. *Ward*, 103—419.

The house entered contained only the prosecutrix, her infant and an old colored servant woman, and the bill contained four counts, one charging an intent to steal the goods of the prosecutrix, one the goods of the servant, one to ravish the prosecutrix, and one to ravish the servant. The evidence was that the prisoner, at the dead of night, demanded admittance at the back door, and when questioned as to his identity falsely gave the name of a white citizen in the community; he then went to another door and violently forced it open, exclaiming as he entered: "There is a woman in here; where is she? After I get her, I have got no use for the house nor anything in it." On the trial the prisoner offered no explanation of this

declaration, but there was evidence that he was a desperate and dangerous man: *Held*, that there was evidence sufficient to go to the jury of the intent to ravish the prosecutrix. *Powell*, 94—965.

Defendant was pursued by armed men, fired at several times and arrested, and in reply to a question then asked confessed the alleged crime of burglary. On the following day the prosecutor and others had an interview with him while he was fettered and in prison, when he told how he broke into the dwelling-house and stole the goods, and what he did with the goods, no threat or promise being made to him: *Held*, that his confession made on the second day, being presumed to proceed from the influence of the fear excited the day before, was inadmissible, but that what he said on the second day as to his disposition of the stolen property was admissible. *Drake*, 82—592.

CHARGE.—Where the indictment simply charges the breaking and entering into the house, it is error to instruct the jury “that if they believed the defendants, however they may have got into the house, broke out of it, they were guilty.” *McPherson*, 70—239.

A charge that if the prisoner was found in possession of a stolen watch and chain on Monday after the burglary committed on Saturday night, “the law presumed that he was the thief, and that the prisoner was bound to explain satisfactorily how he came by the stolen goods,” is erroneous, since the prisoner might have received the watch and chain after some one else had committed the burglary, which would change the grade of the crime very materially. *Graves*, 72—482.

HABEAS CORPUS.—Where the indictment charges *burglary with intent to commit murder*, and defendant consents to a mistrial and then pleads “guilty of larceny,” no judgment can be pronounced, since his confession of being guilty of larceny is not a confession of the crime charged against him. *Queen*, 91—660.

Where judgment is pronounced in such case, sentencing defendant to the penitentiary, he is not entitled to be discharged, but, since the original indictment is still pending against him, he may be taken from the penitentiary by *habeas corpus*, and held to answer the original charge. *Ib.*

Sec. 74 (995). Burglary; breaking out of dwelling-house in the night time.
R. C., c. 34, s. 8. 12 *Anne*, c. 7, s. 3. 78 *Geo. IV.*, c. 29, s. 11. 24, 25 *Vict.*, c. 96, s. 51. 1889, c. 434.

If any person shall enter the dwelling-house of another with intent to commit any felony or other infamous crime therein, or being in such dwelling-house, shall commit any felony or other infamous crime therein, and shall, in either case, break out of the said dwelling-house, in the night-time, such person shall be guilty of burglary.

Sec. 75 (996). Burglary; breaking into certain houses or buildings, a misdemeanor. 1874-'75, c. 166. 1879, c. 323.

If any person shall break or enter a dwelling-house of another otherwise than by a burglarious breaking; or shall break and enter a storehouse, shop, warehouse, banking-house, counting-house, or other building, where any merchandise, chattel, money, valuable security, or other personal property shall be; or shall break and enter any uninhabited house, with intent to commit a felony or

other infamous crime therein; every such person shall be guilty of an infamous crime, and imprisoned in the penitentiary or county jail, not less than four months, nor more than ten years.

INDICTMENT.—An indictment under sections 73 and 74 (Code, sections 996 and 997), containing but one count, alleging that defendant “unlawfully and wilfully did enter, in the night time, a gin-house in which there was cotton, meal and other personal property, with intent to commit the crime of larceny,” and that “he was found by night in said house, with intent to commit the crime of larceny,” is sufficient, since the crimes created in both sections are of a cognate character, and, though the bill does not set out the crimes in the language of the statutes, sufficient matter appears to enable the court to proceed to judgment. *Tytus*, 98—705.

The indictment is not defective because it charges an intent to commit more than one offence. *Christmas*, 101—749.

EVIDENCE.—Evidence that defendant entered a dwelling-house in the night time, having no right to be there, and fled on being discovered, is, in the absence of any explanation on his part, sufficient to be left to the jury. *McBryde*, 97—393.

Sec. 76 (997). Burglary or other felony; the intent to commit, an infamous crime. 24, 25 Viot., c. 96, s. 58.

If any person shall be found by night, armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit a felony or other infamous crime therein; or shall be found by night, having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of house-breaking, or shall be found by night in any such building, with intent to commit a felony or other infamous crime therein, such person shall be guilty of an infamous crime, and punished by fine or imprisonment, or both, in the discretion of the court.

BURNING WOODS.

Sec. 77 (52). No person to fire woods except his own, and notice thereof to be given. R. C., c. 16, s. 1. 1777, c. 123, s. 2.

No person shall set fire to any woods, except it be his own property; nor in that case, without first giving notice in writing to all persons owning lands adjoining to the woodlands intended to be fired, at least two days before the time of firing such woods, and also taking effectual care to extinguish such fire before it shall reach any vacant or patented lands near to or adjoining the lands so fired.

Sec. 78 (53). Penalty fifty dollars; guilty of a misdemeanor. R. C., c. 16, s. 2. 1777, c. 123, s. 1.

Every person wilfully offending against the preceding section shall, for every such offence, forfeit and pay to any person who will sue for the same fifty dollars, and be liable to any one injured in an action, and shall moreover be guilty of a misdemeanor.

CAPIAS.

See NOLLE PROSEQUI.

CASTRATION.

See also MAIM.

Sec. 79 (999). Castration with malice aforethought. R. C., c. 34, s. 4. 1831, c. 40, s. 1. 1868-'9, c. 167, s. 6.

If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim, or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable or render impotent such person, the person so offending shall suffer imprisonment in the penitentiary for not less than five nor more than sixty years.

Sec. 80 (1000). Castration or maiming without malice aforethought. R. C., c. 34, s. 47. 1754, c. 56. 1791, c. 339, ss. 2, 3. 1831, c. 40, s. 2.

If any person shall, on purpose and unlawfully, but without malice aforethought, cut or slit the nose, bite or cut off a nose, lip or ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim, or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person; the person so offending shall be imprisoned in the county jail or penitentiary not less than six months nor more than ten years, and fined, in the discretion of the court.

WHAT DEGREE OF DISFIGUREMENT SUFFICIENT.—Where the maim consisted in biting off an ear, it is not necessary that the whole ear should have been bitten off, but it is sufficient if enough is taken off to alter and

impair the natural personal appearance, and render the person less comely to ordinary observation. Gerkin, 23 (1 Ired.), 121.

INDICTMENT.—On indictment for biting off an ear, it is not necessary to state whether it was the right or left ear. Green, 29 (7 Ired.), 39.

BURDEN ON DEFENDANT TO SHOW THAT THE ACT WAS IN SELF-DEFENCE.—Where defendant in a fight bit off the prosecutor's ear, it is incumbent on him to satisfy the jury that the act was done in self-defence, and though the jury should believe that the severance was the result of the violent manner in which the combatants were separated, yet if the biting was intentional, the maiming is still presumed to be "on purpose" unless defendant satisfies the jury that it was an act of self-defence. Skidmore, 87—509.

CATTLE.

See INJURY TO STOCK.

CERTIORARI AND RECORDARI.

See also APPEAL.

Sec. 81 (545). Writs of certiorari, recordari, and supersedeas, 1874-'5, c. 109.

Writs of *certiorari*, *recordari* and *supersedeas* are hereby authorized as heretofore in use. The writs of *certiorari* and *recordari*, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the *supersedeas*, to suspend execution, shall not issue until an undertaking is filed, or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where the execution is stayed.

PRAYER FOR INSTRUCTION OMITTED BY JUDGE IN CASE SETTLED.—An application for a *certiorari* which avers that a special prayer for instruction was asked in writing and in proper time, and was refused and exception noted, will be denied when it is not alleged that such exception was set out in the appellant's case on appeal, since if appellant did not set it out as an exception in his case on appeal, he can not complain that the judge did not incorporate it in the "case settled" by him. Had the exception been set out in the appellant's statement of the case, and the judge had omitted such prayer and the exception for its refusal from the "case settled," a *certiorari* would lie to have them incorporated. Black, 109—.

CLERK REFUSING TO SEND TRANSCRIPT UNTIL COST PAID.—Where the clerk refuses to send up the case on appeal until the cost of the transcript is paid, a *certiorari* will be issued to bring up the transcript, since the clerk is not entitled to his cost for the transcript in advance in criminal actions. Nash, 109—822.

WHEN MOTION TO DISCHARGE PRISONER IS DENIED.—Where a motion to discharge a prisoner after a mistrial is denied, the proper method to have the alleged errors in ordering the mistrial reviewed is by a petition for a *certiorari* in due form, setting forth the grounds of the application. Locke, 86—647.

OMISSIONS BY JUDGE IN CASE SETTLED NOT MADE BY OVERSIGHT.—A *certiorari* to correct a case on appeal will not be granted when it appears that the omissions complained of were not made by the judge by inadvertence or oversight, and there is no reason to believe that he would amend the case if given opportunity. Sloan, 97—499.

AVERMENTS IN APPLICATION CONTRADICTING CASE SETTLED.—Where the case on appeal is settled by the judge after a full hearing has been accorded, and the action of the court has been careful and considerate, no occasion for interference is presented, and the court can not listen to averments that contradict the statement of the court. Gooch, 94—982.

APPELLEE'S OBJECTIONS IN FORM OF COUNTER-CASE.—It is no objection to the objections filed by the appellee to the appellant's case that it is in the form of a counter-case, and not of specific objections. Gooch, 95—982.

RECORDARI TO HAVE CASE DOCKETED.—A warrant for bastardy was returnable at 10 a. m., but the justice, of his own motion, and without notice to prosecutrix, changed the place of trial to a place eight miles distant and in another township, and the hour of hearing to 1 p. m. It was raining, the roads were "in a wretched condition," and prosecutrix protested because she had no means of riding to the place of trial. The justice tried the case in the absence of prosecutrix and the state's witnesses, and discharged defendant. The prosecutrix gave notice of appeal, and the justice promised to send up the papers, but failed to do so, assigning as a reason the non-payment of his fees: *Held*, that on the case being brought up by *recordari*, a motion to docket the case was properly granted. Warren, 100—489.

WHEN AVERMENT OF MERITS IN APPLICATION UNNECESSARY.—In such case the appeal having been lost by the conduct of the justice, an averment of merits in the application for the *recordari* was unnecessary. Warren, 100—489.

WHEN WRIT GRANTED WITHOUT SECURITY.—A *recordari* may be granted without giving security when no execution is stayed and no default is imputable to the relator. Warren, 100—489.

WRIT GRANTED IN FORMA PAUPERIS.—A writ of *recordari* may be granted in *forma pauperis*. Warren, 100—489.

NO APPEAL FROM ORDER DOCKETING A CASE.—An appeal from an order docketing a case brought up on *recordari* is premature and may be dismissed. Warren, 100—489.

APPLICATION DENIED.—As a matter of practice the supreme court will not send down a *certiorari* unless sufficient excuse is made to appear, but will on motion of the attorney-general, or adverse party, dismiss the appeal. Frizell, 111—722.

Where appellant, without whose default the appeal was not settled by the judge, fails to docket at the next succeeding term, an application for a *certiorari* at such term will not be allowed. Freeman, 114—872.

Where an insufficient record is sent to the supreme court the appeal will be dismissed unless it appears that the appellant is guilty of no *laches*, or unless a serious question is presented. May, 118—1204.

Where an appellant has ground for a *certiorari* he should move for it before the case is reached for argument. Harris, 114—830.

WHEN GRANTED.—Defendants served their case on appeal in due time on the solicitor, but it was agreed that the solicitor should have fifteen days within which to file exceptions; the exceptions were prepared and sent to the associate counsel of the solicitor, who resided in the same town with defendants' attorney, on the fifteenth day, with instructions to hand them to defendants' counsel, but as he was absent it was not done until next day: *Held*, that there was *laches* in not causing the exceptions to be served within the stipulated time, and defendants were entitled to a *certiorari* to send up their case, which would be substituted for that settled by the judge. Price, 110—599.

IMPROVIDENT APPEAL FROM INFERIOR COURT.—Where an appeal is improvidently taken from an inferior court to the supreme court it will be dismissed, and the appellant will be remitted to his right to *certiorari* from the superior court and to an appeal from the latter if an appeal becomes necessary. Ray, 122—1097.

WHEN GRANTED EX MERO MOTU.—Where, by inadvertence, the judgment of the court below is omitted from the transcript, the supreme court will, *ex mero motu*, send down an *instantur certiorari* to perfect the record. Beal, 119—809.

MUST BE ASKED BEFORE APPEAL REACHED.—*Certiorari* in lieu of a lost appeal should be moved for before the appeal is regularly reached in its order on the docket. Rhodes, 112—857.

WHEN ISSUED WITHOUT NOTICE.—While the court may, in matters of grave concern, permit *certiorari* to issue on motion of a party without notice to the other side, or *ex mero motu*, this will not be done where the record shows only technical and not substantial grounds of exception to the proceeding below. Jackson, 112—849.

NO AMENDMENT TO TRANSCRIPT.—An amendment or correction to a case or transcript on appeal can not be made by a party himself without *certiorari* granted. Jackson, 112—849.

APPEAL WITHOUT MERIT DISMISSED THOUGH TRANSCRIPT DEFECTIVE.—Where a defective transcript is filed, the supreme court, ordinarily, will direct a writ of *certiorari*, but if it is apparent from the case settled that the appeal is without merit, it will be dismissed. Preston, 104—733.

CERTIORARI FOR THE STATE ON REFUSAL OF MOTION TO AMEND THE RECORD.—A *certiorari*, as a remedial writ, will be granted on behalf of the state in a criminal action, under the supervisory power conferred upon this court by section eight, article four of the constitution, where it appears in the petition that the superior court, on motion of the state to amend the record of a trial so as to make it speak the truth, refused to hear evidence in support of the motion on the ground of a want of power. Swepson, 83—584.

CASE SETTLED BY JUDGE CONCLUSIVELY TRUE.—An application for a *certiorari*, which states that the case as prepared by the trial judge after disagreement of counsel, erroneously states that certain objectionable evidence was withdrawn from the jury when in fact it was not so withdrawn, must be denied. The case as prepared by the judge on disagreement of counsel must be accepted as conclusively true. Gay, 94—821.

APPLICATION TO CORRECT STATEMENT IN REGARD TO PUNISHMENT DENIED.—Where the application is made for the purpose of correcting certain statement of fact as to what transpired after judgment in an effort to obtain a modification of the sentence, it must be denied, since, as the punishment is a matter of discretion, it must also be a matter of discretion whether the court will hear evidence for a modification of the judgment. Miller, 94—902.

JUDGMENT NOT VACATED UNTIL STATUTE COMPLIED WITH.—A judgment in a criminal action is not vacated by an appeal until the statutory requirements are complied with. Bennett, 93—503.

APPEAL LOST BY CONDUCT OF ADVERSARY.—Where a party has lost his appeal by the conduct of his adversary his remedy is by *certiorari*, and not by motion for a new trial. Bennett, 93—503.

FRIVOLOUS APPEAL.—Where the transcript fails to show that a court was held, or that a grand jury presented the indictment, and when it appears from the case on appeal that the grounds on which defendant appealed are frivolous, the appeal will be dismissed. McDowell 93—541.

A *certiorari* will not be granted when it appears from the case on appeal that there are no merits in the case. *Ib.*

CERTIORARI FROM ONE SUPERIOR COURT TO ANOTHER ON REMOVAL.—On removal from one superior court to another the latter court may issue a *certiorari* to the former, directing a more perfect transcript to be certified. Collins, 14 (3 Dev.), 118.

CERTIORARI INSTEAD OF APPEAL FROM INTERLOCUTORY JUDGMENT.—While no appeal lies, in state cases, from an interlocutory order or judgment, yet where a matter involves the power of a superior court and error in its exercise, as where the judge improperly discharges a jury and refuses to discharge the prisoner, the record below may be brought up for review by a writ of *certiorari* in the nature of a writ of error. Jefferson, 66—309.

EFFECT OF THE WRIT.—The granting of a *certiorari* has the same effect as an appeal as to a stay of execution, and where the defendant has been committed to jail in execution of the judgment, he is, after the writ has been granted, entitled to bail pending the hearing of the case in the supreme court. Walters, 97—489.

CHALLENGES TO JURORS.

See also JURORS.

In addition to the peremptory challenges there are also the following challenges for cause:

CHALLENGES TO THE ORIGINAL PANEL:

1. Formed and expressed an opinion. Efler, 85—585. Potts, 100—457. Collins, 70—241. Green, 95—611.
2. Taxes for preceding year not paid. Section 305. (The Code, section 1722.)
3. Suit pending and at issue. Section 311. (The Code, section 1728.)
4. Moral character not good. Section 305. (The Code, section 1722.)
5. Want of sufficient intelligence. Section 305. (The Code, section 1722.)
6. Relationship within ninth degree. Potts, 100—457. Shaw, 25 (3 Ired.), 532. Perry, 44 (Burb.), 330.
7. Any prejudice. McAfee, 64—339.

CHALLENGES TO A SPECIAL VENIRE:

1. Formed and expressed an opinion.
2. Taxes for preceding year not paid.

3. Suit pending and at issue.
4. Served on jury within two years. Section 316. (The Code, section 1733.)
5. Freeholder within the county. Section 316. (The Code, section 1733.)
6. Moral character not good.
7. Want of sufficient intelligence.
8. Relationship within ninth degree.
9. Any prejudice.

It is essential to the purity of trial by jury that ever juror shall be free from bias, and if the juror's mind has been poisoned by prejudice of any kind, whether resulting from reason or passion, he is unfit to sit on a jury. Any fact or circumstance may be given in evidence, tending to establish bias, prejudice, or partiality on either side. McAfee, 64—339.

CHAMPERTY.

No case reported.

CHARACTER.

See EVIDENCE.

CHARGE.

See JUDGE'S CHARGE.

CHEATING.

See FALSE PRETENCE.

CHURCH.

See RELIGIOUS CONGREGATION.

CIGARETTES.

Sec. 82. Cigarettes; unlawful to sell to minors. 1891, c. 276.

It shall be unlawful for any person, firm or corporation to sell, give away or otherwise dispose of, directly or indirectly, cigarettes or tobacco in the form of cigarettes, or cut tobacco in any form or shape which may be used or intended to be used as a substitute for cigarettes, to any minor under the age of seventeen years, and any one violating the provisions of this act, or any person or persons aiding, assisting or abetting the violations thereof shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment in the discretion of the court.

Any person who shall or may aid or assist any such minor child in obtaining the possession of cigarettes or tobacco in any form used as a substitute therefor, by whatsoever name it may be called, shall be guilty of a misdemeanor, and upon conviction, shall be fined or imprisoned in the discretion of the court.

CIRCUMSTANTIAL EVIDENCE.

See EVIDENCE.

CITIES.

See TOWNS AND CITIES.

COLTS AND CALVES.**Sec. 83 (1797). Owners of studhorses and bulls to have a lien on colts and calves. 1872-'3, c. 94, s. 1. 1885, c. 72. 1887, c. 14.**

In all cases where the owner or any agent for or employee of the owner of any mare, jennet or cow, shall turn the same to a

studhorse or jack or bull, for the purpose of raising colts, or calves, the price charged for the season of the studhorse or jack shall be constituted a lien on the colt or calf until the price so charged for the season is paid by the owner of the colt or calf, his agent, or employee.

Sec. 84 (1798). Colt or calf not exempt from execution ; misdemeanor. 1872-'3, c. 94, s. 2. 1879, c. 47. 1885, c. 72. 1887. c. 14

The colt or calf shall not be exempt from execution for the payment of said season price by reason of the operation of the personal property exemption: *Provided*, that the person claiming such lien on the colt or calf shall close the same within twelve months from the foaling of the colt or calf, and any overseer, agent, or employee, removing, exchanging, or secreting, with intention to prevent or hinder the enforcement of said lien, shall be deemed guilty of a misdemeanor, and upon conviction in any court having jurisdiction thereof, shall be fined not more than twenty dollars, nor less than five dollars, or imprisoned not more than thirty days, in the discretion of the court.

COMMENTS OF COUNSEL.

See also ARGUMENT OF COUNSEL.

It is the duty of the court, if counsel state facts as proved upon which no evidence has been given, to correct the mistake, and this may be done at the time or in the charge. O'Neal, 52 (7 Ire.), 251.

The omission of the solicitor to introduce one of his witnesses is a proper subject of comment by defendant's counsel. Smallwood, 75—104.

Where the judge promptly interferes and cautions the jury that the improper remarks should not be permitted to make any impression on their minds unfavorable to the defendant, and it does not appear that the remarks complained of had any prejudicial effect, a new trial will not be granted. Rivers, 90—738. Wilson, 90—736.

Where a written order is introduced as corroborating evidence, the existence of such order and not its contents is the important fact, and whether the witness could read or not, or whether the contents were proved or not, the fact that the witness got a pair of boots with such order is a legitimate circumstance for the jury and for the comment of the solicitor. Capps, 71—93.

It is not error for a prosecuting officer to comment on the personal appearance of the defendant in reply to remarks of defendant's counsel calling attention to his appearance. Underwood, 77—502.

It is not improper in a prosecuting officer to comment on the fact that the defendant had sworn a witness and afterwards declined to examine him. Jones, 77—520.

Abuse of privilege of counsel to the real prejudice of a defendant entitles him to a new trial, but mere "cross-firing," which is stopped by the court before any real injury is done, does not warrant a new trial. Underwood, 77—502.

Defendant's counsel in addressing the jury said that his client was a respectable white man, and that it was unreasonable to suppose that he would steal meat. The solicitor in reply said: "Now, gentlemen of the jury, I am a colored man; you are white men. If the defendant was a colored man you would convict him in five minutes on this evidence": *Held*, that the error, if any, in permitting such remark by the solicitor was cured by a caution of the court to the jury not to be influenced by such remarks. Hill, 114—780.

It is proper for the judge to interrupt counsel who addresses his remarks to certain members of the jury individually. Pearson, 119—871.

In all cases questions tending to disparage or disgrace a witness may be asked, provided they are limited to particular acts; but even then, when it is apparent to the court that they are put merely for the purpose of annoying or harassing the witness, the trial judge may, in his discretion, refuse to compel him to answer, but such refusal is a legitimate subject of comment before the jury. Gay, 94—814.

On a trial for murder a witness for the state testified that at the time of the killing he was in the grasp of the deceased, but did not see who struck the blow; that afterwards he met the prisoner who remarked: "Didn't I tell you I would relieve you from that man? I got the damned son-of-a-bitch." The prisoner did not offer himself as a witness and introduced no evidence. Counsel for the state in his argument to the jury repeated the testimony of this witness and said: "Now, gentlemen of the jury, no one has contradicted the testimony of Mose McMillan, and you must accept it as the truth." No exception was taken to this remark at the time, nor was the attention of the court called to it: *Held*, not to be error; the privileges of the defendant are enlarged by the act allowing him to testify, but officers prosecuting for the state are not restricted from making such comment on the testimony as would have been legitimate before the passage of the act allowing the defendant to testify. Weddington, 103—364.

On trial for larceny counsel for the state in his argument said "that if the judge had believed that the defendant had made out a fair claim to the property he would have directed a verdict of acquittal without their leaving the box; but as he had not done so the judge must not have believed that a fair claim to the property had been shown by the defendant." This passed unnoticed by the judge then and in his charge. When the jury returned with a verdict of guilty and on being polled three of them did not concur, the judge informed them that "he had no opinion of his own and that it was improper for counsel to so have represented him": *Held*, to be error; the remarks of counsel were improper and the attempted correction of them came too late. Caveness, 78—484.

An exception to improper remarks by counsel must specify what was said; otherwise the supreme court can not see that any prejudice resulted from the irregularity. Caveness, 78—484.

On trial for larceny counsel for the state argued to the jury "that some time or other possibly one of them might be compelled to have a suit for property upon which he relied for subsistence, and the person with whom he was in litigation might seize and detain it, as the defendant had done in this case; that they must remember that at some time one of them might be placed in the circumstances of the prosecutrix, and as they would expect justice themselves, so they must mete it out to the prosecutrix," when he was stopped by the court: *Held*, that the court properly stopped such remarks. Caveness, 78—484.

The state never asks that one of her citizens shall be either convicted of a high crime or imperilled in his trial by appeals to the passions and selfish private interests of the jurors. The evidence should be fairly and impartially stated to the jury, and the deductions and argument therefrom legitimate and candid. Caveness, 78—484.

Comments of counsel are under the supervision of the trial judge, and the supreme court will not interfere with the exercise of his discretion unless it plainly appears that he has been too vigorous or too lax in exercising it to the detriment of the parties. Craine, 120—601.

It is not improper for counsel for the prosecution to comment on the fact that defendant failed to introduce witnesses whom he had summoned and who were present, or that he failed to prove his innocence by his brother, who had been summoned by the state. Kiger, 115—746.

ATTENTION MUST BE CALLED.—Even if counsel make improper arguments to the jury it can not be assigned as error unless the attention of the judge was called to it at the time. Lewis, 93—581.

It is not improper for a prosecuting officer in his argument to the jury to comment on the fact that the defendant had sworn a witness and afterwards declined to examine him. Jones, 77—520.

Abuse of privilege of counsel in the argument to the jury is never ground for a new trial, except when it is gross and probably injured the complaining party, and was not properly checked and corrected by the court. Rogers, 94—860.

An exception for abuse of privilege not made until after verdict will not be considered. Speaks, 94—865.

Objections to comments of counsel not made until after the verdict come too late. Powell, 106—635.

ATTORNEYS—PRELIMINARY STATEMENT.—Counsel may make a preliminary statement to the jury of what a party expects to prove in both civil and criminal cases. Sheets, 89—543.

RIGHT OF COUNSEL TO SPEAK.—The presiding judge has no authority to refuse to hear more than one of defendant's counsel, or to restrict counsel in their remarks to any particular length of time. Miller, 75—73.

It is no ground for a new trial that counsel for the prisoner was limited by the court in his remarks to one hour and a half. Bynum J., *dissenting*. Collins, 70—241.

READING DECISIONS OF SUPREME COURT TO JURY.—Counsel have no right to read a statement of facts contained in the report of a former trial of the same case in the supreme court for the purpose of contrasting such statement with the statement of the witnesses in the pending trial. Whit, 50 (5 Jones), 224.

Counsel may read adjudged cases in their arguments to the jury, but the facts contained in such cases can not be commented on as the facts of the case on trial. Powell, 94—965.

Counsel have no right to read, in their argument to the jury, an opinion of the supreme court delivered on an appeal from a former trial of the same case detailing some of the facts of the case as they then appeared. Smallwood, 78—560.

ABUSE OF PRIVILEGE OF COUNSEL.—Counsel for the prosecution in addressing the court on a motion to withdraw a juror and order a mistrial on the ground of alleged fraud in selecting the jury, said, in the presence and hearing of the jury then impaneled, that two of the jurors had gone into the box "with souls blackened with perjury and bribery, and that all hell could not change their minds," and persisted in the use of abusive language toward the two jurors during the trial, all of which was against the objections of counsel for the prisoners. One of the counsel for the

state while addressing the jury stepped on the foot of the one of the jurors charged with bribery, saying to him, "I beg your pardon, I only wanted to wake you up," though the juror was not only awake but demeaning himself properly: *Held*, that the errors of such conduct could not be cured by the charge of the court, and defendants are entitled to a new trial. *Noland*, 85—576.

COMMENTS OF COUNSEL—ABUSE OF PRIVILEGE.—Where defendant introduces himself as a witness, but fails to introduce evidence as to his character, and there is a conflict between his testimony and that of the prosecutrix, a comment by the solicitor that the defendant was "without a character," is legitimate. *Davis*, 92—764.

COMMITMENT.

SEC. 85. What the commitment shall set forth.

SEC. 86. What every commitment shall state.

SEC. 87. To what jail prisoner committed.

SEC. 88. Persons imprisoned in county jail, exception as to sheriff.

Sec. 85 (1238). What the commitment shall set forth. 1868-'9, c. 178, sub chap. 4, s. 17.

The commitment to the county prison shall set forth:

- (1) The name of the guilty person;
- (2) The nature of the offence of which he is convicted and the date of the trial;
- (3) The period of his imprisonment;
- (4) It shall be directed to the sheriff of the county, or to the keeper of the county jail, and shall direct him to keep the prisoner for the time stated, or until discharged by law;
- (5) The name of the constable or other officer required to execute it;
- (6) It shall be signed by the justice and be dated.

Sec. 86 (1163). What every commitment shall state. 1868-'9, c. 178, sub chap. 3, s. 32.

Every commitment to prison of a person charged with crime shall state:

- (1) The name of the person charged;
- (2) The character of the offence with which he is charged;
- (3) The name and office of the magistrate committing him;
- (4) The manner in which he may be discharged; if upon giving recognizance or bail, the amount of said recognizance, the condition on the performance of which it shall be discharged, and the persons or magistrate before whom the bail may justify;
- (5) The court before which the prisoner shall be sent for trial.

DEFECTIVE MITTIMUS.—One who forcibly and violently rescues a prisoner from custody, is guilty though the *mittimus* under which the officer is acting simply commands the jailer to take the body of defendant and him safely keep in the common jail until discharged according to law. The insufficiency of the *mittimus* can not be taken advantage of by third persons in such manner though the jailer may have been authorized to refuse the prisoner until a more perfect *mittimus* was sent, or the defendant could have inquired into the legality of his imprisonment by *habeas corpus*. Armistead, 106—639.

Sec. 87 (1164). To what jail prisoner shall be committed. 1868-'9. c. 178, sub chap. 2, s. 33.

All persons committed to prison before conviction shall be committed to the jail of the county in which the examination is had, or to that of the county in which the offence is charged to have been committed: *Provided*, if the jails of these counties are unsafe or injurious to the health of prisoners, the committing magistrate may commit to the jail of any other convenient county. And every sheriff or jailer to whose jail any person shall be committed by any court or magistrate of competent jurisdiction, shall receive such prisoner and give a receipt for him, and be bound for his safe keeping as prescribed by law.

Sec. 88 (1174). Persons to be imprisoned in county jail; exception as to a sheriff. R. C., c. 35, s. 3. 5 Hen. IV, c. 10.

No person shall be imprisoned by any judge, court, justice of the peace, or other peace officer, except in the common jail of the county: *Provided*, that whenever the sheriff of any county shall be imprisoned, he may be imprisoned in the jail of any adjoining county.

COMPOUNDING OFFENCE.

On the trial of a justice of the peace charged with compounding a felony, the court was requested to charge, in substance, that the defendant, being a justice of the peace, was not guilty of compounding a felony for merely making an honest mistake in judgment in regard to his duty to dismiss the parties before him charged with the felony, and if he, through ignorance of law, failed to conduct the case in a regular and orderly manner he was not guilty. His Honor gave the instruction modified by the substitution of the words, "This alone would not make him guilty" for the closing words of the prayer: *Held*, there was no error. Furr, 121—606.

Where parties charged with larceny were arrested and taken before a justice of the peace and were discharged after the payment of a certain sum agreed upon between them and the prosecutor, such voluntary payment was evidence of their guilt of the larceny charged, and the acceptance of the costs from the defendants by the magistrate was some evidence against him on the trial of an indictment for compounding the felony. Furr, 121—606.

CONCEALING BIRTH OF CHILD.

Sec. 89 (1004). Concealing birth of child. R. C., c. 34, s. 28. 1818, c. 985. 1883, c. 390. 21 Jac. I, c. 27. 43 Geo. III, c. 58, s. 3. 9 Geo. IV, c. 31, s. 14.

If any woman or other person shall by secretly burning or otherwise disposing of the dead body of a newborn child of such woman, or any other woman, or endeavors to conceal the birth of such child, such person shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, such imprisonment to be in the county jail or penitentiary, at the discretion of the court: *Provided*, that the imprisonment in the penitentiary shall in no case exceed a term of ten years: *Provided further*, that nothing in this section shall be construed to prevent the mother, who may be guilty of the homicide of her child, from being prosecuted and punished for the same according to the principles of the common law. And any person aiding, counseling or abetting any woman in concealing the birth of her child, shall be guilty of a misdemeanor.

INDICTMENT.—An indictment for concealing the birth of a child “by then and there secretly placing and leaving the dead body of said child in a secret place,” is sufficient. Stewart, 93—539.

FORMER CONVICTION.—A former conviction for concealing the birth of a bastard child is no defence to an indictment for the murder of such child. Morgan, 95—641.

FORMER CONVICTION MUST BE PLEADED.—Former conviction, or acquittal, must be pleaded to be available, it can not be considered on a motion in arrest of judgment. Morgan, 95—641.

THE CORPUS DELICTI.—The *corpus delicti* is concealing the death of a being upon whom the crime of murder could have been committed; and, therefore, if the child be born dead concealment is not an offence against the statute. Joiner, 11 (4 Hawks), 351.

BURDEN TO SHOW CHILD DEAD.—It is not incumbent on the state to show that the child was born alive, but the burden of showing that it was dead is on the accused. Joiner, 11 (4 Hawks), 351.

If the child is born dead the concealment is not an offence, but the burden is on the defendant to show that it was born dead. Joiner, 11 (4 Hawks), 350.

CONCEALED WEAPONS.

Sec. 90 (1005). Concealed weapons; the carrying of unlawfully, a misdemeanor. 1879, c. 127. 1883, c. 81. 1887, c. 68. 1891, c. 55. 1893, c. 2. 1893, c. 10.

If any one, except when on his own premises, shall carry concealed about his person any pistol, bowie knife, dirk, dagger, slungshot, loaded cane, brass, iron or metallic knuckles or razor or other deadly weapon of like kind, he shall be guilty of a misdemeanor, and fined or imprisoned at the discretion of the court. And if any one, not being on his own lands, shall have about his person any such deadly weapon, such possession shall be *prima facie* evidence of the concealment thereof. This section shall not apply to the following persons: officers and soldiers of the United States army, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties.

STATUTE CONSTITUTIONAL.—This statute is not in conflict with Const. N. C., art. 1, s. 24, giving citizens the "right to keep and bear arms." Speller, 86—697.

BUTCHER'S KNIFE A DEADLY WEAPON.—A butcher's knife eleven inches long with a sharp pointed and sharp edged blade six inches long, and one and one-fourth inches wide, is a deadly weapon within the meaning of the statute. Erwin, 91—545.

POSSESSION PRIMA FACIE EVIDENCE.—The possession of a pistol off one's premises is *prima facie* evidence of concealment and of the criminal intent. McManus, 89—555.

WHO MAY BE CONVICTED—THE INTENT.—The jury returned a special verdict in which they find that defendant carried a pistol concealed in his pocket from a store where he had purchased it to another about three hundred yards distant for the purpose of having it packed with other goods, and that he had no criminal intent in doing so: *Held*, that defendant was not guilty. Gilbert, 87—527.

HUNTING.—If one carry a pistol off his own premises concealed about his person, for the purpose of hunting, he is guilty. Woodfin, 87—526.

MINOR SON ON FATHER'S LAND.—A minor son living with his father, who carries a pistol concealed about his person, in the public road running over the lands of his father, without going off his father's land, is not guilty. Hewell, 90—705.

THREATS BY PROSECUTOR NO EXCUSE.—The fact that the prosecutor had made threats of violence against defendant and that he thought it necessary to carry the pistol for his own protection, is no excuse for violating the statute. Speller, 86—697.

PISTOL BUCKLED AROUND THE BODY.—Carrying a pistol buckled around the body without a scabbard and naked on a belt is not a violation of the statute. Roten, 86—701.

TENANTS—SERVANTS.—One who is in the occupation of land as a tenant, or agent, or overseer, can not be convicted of the offence of carrying concealed weapons, but a mere servant or hireling can. Terry, 93—585.

CARRYING PISTOL FOR PURPOSE OF TRADING.—One who carries a pistol concealed in his pocket a distance of six miles, off his own premises, for the purpose of trading it off, is not guilty, if the jury believe that such was his only purpose. Harrison, 93—605.

TO DELIVER TO OWNER.—One who carries a pistol off his own premises in his pocket for the purpose of delivering it to the owner who had sent him for it, is not guilty. Brodnax, 91—543.

OFFICERS.—Neither a deputy marshal of the United State, nor any other civil officer, has a right to carry a concealed weapon about his person while off his own premises unless he is *actually* engaged in the discharge of his official duty; and the burden is on him to show that fact. Hayne, 88—625.

DEFENDANT TESTIFYING IN HIS OWN BEHALF.—Where defendant testifies in his own behalf, he may be compelled to answer whether he has carried a concealed weapon about his person while off his own premises within two years preceding the indictment, since by offering himself as a witness he waives his constitutional right not to answer questions tending to criminate him. Allen, 107—805.

SERVANT OR HIRELING.—A mere servant or hireling who carries a concealed weapon on the premises of his employer is indictable. Deyton, 119—880.

PRESUMPTION OF INTENT.—An admission by the defendant that he carried a pistol home in his pocket raises the presumption that he carried it with the intent to conceal it, and the question as to whether such presumption is rebutted by the evidence is one for the jury. Hinnant, 120—572.

The question as to whether the presumption of guilty intent is rebutted by the mode of carrying the weapon is one for the jury. Reams, 121—556.

The evidence was that defendant, while off his own premises, had a pistol on his person under his overcoat, but it was not shown whether the overcoat was worn open or buttoned, and there was also evidence that the pistol could be seen: *Held*, that it was error to instruct the jury that if they believed the evidence the defendant was guilty, since it was for the jury, and not the judge, to determine whether the evidence was sufficient to rebut the presumption of concealment raised by the statute, and whether or not the weapon was in fact concealed. Lilly, 116—1049.

PARTLY EXPOSED WEAPON.—It is error to charge that if the jury believe beyond a reasonable doubt that any part of the weapon was concealed, that is, could not be seen from the outside, the defendant would be guilty. If the weapon is partly exposed to the public view, it would be difficult and unreasonable to say, as a legal conclusion, that it was concealed. Reams, 121—556.

GIST OF THE OFFENCE.—The gist of the offence of carrying a concealed weapon about one's person and off his own premises consists in the guilty intent to carry it concealed and not in the intent to use it. Reams, 121—556.

The gist of the offence of carrying a concealed weapon is the manner of carrying it. Lilly, 116—1049.

The offence of carrying a concealed weapon consists in the guilty intent to carry it concealed, and does not depend on the intent to use it. Dixon, 114—850.

OFFICERS OF CORPORATIONS.—The exception in the statute does not apply to the officials of corporations, such as turnpikes, railroads and others, which invite the public to use their lines of travel. Perry, 120—580.

The superintendent of a turnpike company owning a turnpike nine miles long and open to public travel, when on such turnpike, is not "on his own premises" or "on his own lands" within the meaning of the exception in the statute, although he has absolute control of all the property of the company. *Perry*, 120—580.

The use of the words "on his own premises" and not being "on his own lands" shows an intention to restrict the right to carry concealed weapons to those who are in the privacy of their own premises and not likely to be thrown into contact with the public, nor tempted on a sudden quarrel to use the advantage a concealed weapon gives. *Perry*, 120—580.

PERSON ARRESTED ON HIS OWN PREMISES.—The fact that defendant was arrested on his own premises and taken immediately before a justice who committed him to jail, and that the jailer in searching him found a pistol concealed on his person, sufficiently establishes his guilt; though if he had asked, when arrested on his own premises, to be allowed to leave it at home and the officer had refused, he would have had some defence, but even then it would have been incumbent on him to explain why he did not carry the pistol openly after leaving his premises. *Pigford*, 117—748.

CARRYING FOR PURPOSE OF SELLING.—Where one carries a pistol simply for the purpose of selling it, having no engagement to sell it to any particular person, he is guilty. *Overruling State v. Harrison*, 93—605. *Dixon*, 114—850.

CONFESSIONS.

See **EVIDENCE**.

CONSPIRACY.

INDICTMENT—TO CHEAT AND DEFRAUD.—On indictment for a conspiracy to cheat and defraud, the means to be used need not be charged. *Brady*, 107—822.

CONSPIRACY TO MAKE DRUNK AND PLAY FALSELY AT CARDS.—A combination of two to cheat a third person by making him drunk and playing falsely with him at cards is indictable at common law. *Younger*, 14 (3 Dev.), 357.

EVIDENCE—PROOF OF GUILT MAY PRECEDE PROOF OF CONSPIRACY, WHEN.—Where a conspiracy is charged, proof of the conspiracy should precede proof of guilt, but the trial judge, in his discretion, may reverse this order when thereby the case can be more conveniently developed. *Jackson*, 82—565.

DECLARATIONS OF ONE NOT COMPETENT AGAINST HIS CO-CONSPIRATOR.—The declarations of an alleged conspirator made in the absence of his co-conspirators, are not competent against any one except himself. *Earwood*, 75—210.

THERE MUST BE EVIDENCE OF COMMON DESIGN.—Where an indictment for conspiracy contains three counts, the first for conspiring to commit rape

on F; the second, the like intent on E; and the third the same upon "certain female persons to the jurors unknown," and there is no evidence of a common design, defendants must be acquitted. *Trice*, 88—627.

In such case a charge that the jury might convict on the first two counts, provided they though defendants guilty under the third count is erroneous. *Ib.*

DECLARATIONS MADE AFTER OFFENCE COMMITTED.—Declarations of one of a number of conspirators, who is not on trial, made after the offence had been committed, are inadmissible, because not made in furtherance of the common design. *Dean*, 35 (13 *Ired.*), 63.

JURISDICTION.—Where an inferior court is given concurrent jurisdiction with the superior court of the offence of conspiracy, and an act is passed giving the inferior court "exclusive original" jurisdiction of such offences, the superior court still has jurisdiction to proceed to judgment on an indictment pending in that court at the time the act was passed. *Distinguishing State v. Perry*, 71—522. *Littlefield*, 93—614.

PUNISHMENT.—A conspiracy to charge one with infanticide being only a misdemeanor at common law, is not punishable by imprisonment in the penitentiary. *Jackson*, 82—565.

WHAT IS A CONSPIRACY.—A combination by two or more to do any unlawful act, or one prejudicial to another, is indictable as a conspiracy. *Younger*, 12 (1 *Dev.*), 357.

DEGREE OF CONSENT.—The least degree of consent or collusion between parties to an illegal transaction makes the act of one the act of the others. *Anderson*, 92—732.

ONE CONSPIRATOR GOING BEYOND ORIGINAL OBJECT.—If two persons conspire to vex, annoy, and commit unlawful acts upon a third, and in consequence of their unlawful plans one of them kills their victim, they are both responsible for such homicide, although their original object in conspiring together did not compass so great a crime. *Finley*, 118—1161.

IF CONSPIRACY SHOWN BOTH GUILTY.—In the absence of evidence of a conspiracy, if two persons are indicted for murder, and the jury are in doubt as to which struck the fatal blow, they should acquit both; but if a conspiracy has been shown they should both be convicted under such circumstances, for having conspired together to commit the crime they are both principals, and it is immaterial to inquire which of the two actually struck the blow. *Finley*, 118—1161.

DECLARATIONS OF ONE COMPETENT AGAINST THE OTHER.—Where a conspiracy is shown to have existed the declarations of one conspirator are evidence against the others. *Mace*, 118—1244.

Where a conspiracy is proved, the acts of one of the associates in furtherance of that purpose, as well as his declarations in respect to the common design, are admissible against the others; and this where the act or declaration is subsequent to the actual perpetration of the crime. As to declaration see *Dean*, (13 *Ire.*), 63. *Haney*, 19 (2 *D. & B.*), 390.

In a prosecution for conspiracy to defraud insurance companies a witness for the state testified that he was the agent of defendants to fraudulently obtain insurance on the lives of deceased or aged persons and find purchasers for the policies who would keep the premiums paid; that one B, who was not on trial, "was also the agent of the defendants; that they all said he was," and that witness saw B offer to sell a policy on the life of M: *Held*, that the declarations of B, made after the entry of defendants into the conspiracy, and up to the time when the overt act was committed, were admissible against defendants. *Turner*, 119—841.

SEDUCTION.—Conspiracy to seduce and defile a young unmarried woman is an indictable offence at common law. *Powell*, 121—635.

SHAM MARRIAGES—INDICTMENT.—An indictment charging three defendants with having conspired to procure sham marriages between two of them and two women is not bad for duplicity. *Wilson*, 121—650.

A marriage pretendedly celebrated before an unauthorized person being a nullity and not capable of being legalized by consent, a conspiracy to procure sexual intercourse with a woman through such pretended marriage is an indictable offence. *Wilson*, 121—650.

ACTUAL PERPETRATOR NEED NOT BE JOINED IN INDICTMENT.—Where the unlawful act, in furtherance of a conspiracy to defraud, is done in the state where the indictment is found, the conspirators who participated only in the design may be tried without joining in the indictment the perpetrator of the overt act. *Turner*, 119—841.

ACTS OF THOSE NOT INDICTED MAY BE SHOWN.—Where in a prosecution of several defendants for conspiring to defraud, evidence of a common design is shown, testimony tending to prove the unlawful acts of persons not indicted, in furtherance of the common design, is competent. *Turner*, 119—841.

ACQUITTAL OF ONE—EFFECT.—On indictment for conspiracy against two the acquittal of one is the acquittal of the other. *Tom*, 13 (2 Dev.), 570.

CONSTITUTION.

USE OF BICYCLE ON ROAD.—A statute forbidding the use of bicycles on a certain road, unless permitted by the superintendent of the road, is not unconstitutional. *Yopp*, 97—477.

ENACTING CLAUSE OF STATUTE.—A statute without the enacting clause, "The General Assembly of North Carolina do enact," is inoperative and void. *Patterson*, 98—660.

APPOINTMENT OF JUDGE.—Upon the death of one of the judges of the superior courts, and before the appointment of his successor, the governor has the authority, under Const. N. C., art. 4, section 11, to require one of the other judges to hold one or more specified terms of the court in the district assigned to the deceased judge. *Davis, J., dissenting. Lewis*, 107—967.

The statute authorizing the governor to appoint special terms of the superior courts is not unconstitutional, and in appointing such special terms, the governor may commission a judge to hold a court for the trial of both civil and *criminal* cases, though the judge who asked for a special term only certified an accumulation of *civil* cases. *Ketchey*, 70—621.

A judge who presides in another district by appointment of the governor is a *de facto* judge of the court so held, and all his acts in that capacity are valid. *Turner*, 119—841.

PROFANE LANGUAGE IN LIMITED LOCALITY.—An act of the legislature making it unlawful to use profane language in certain localities, being a police regulation, is not obnoxious to the constitution on the ground that it is not uniform and in effect over the whole state. Such police regulations may be limited in their operation to such localities as the legislature may prescribe, as in the case of the sale of seed, cotton, liquor and other things. *Warren*, 113—683.

An act of the legislature which makes it unlawful to use profane language to the disturbance of the peace on the lands of a certain cotton mill

is not an undue interference with the freedom of speech guaranteed by the constitution, although the language used falls short of being a nuisance. Warren, 113—683.

DISCRIMINATION BETWEEN COUNTIES.—A statute which discriminates between the different counties of the state as to the time when the payment of taxes can be compelled is not unconstitutional, since its provisions affect every one alike in the localities to which they are applicable and contain no violation of the principle of equal taxation. Jones, 121—616.

One state can not enforce the penal or criminal laws of another or punish crimes or offences committed in and against another state. Hall, 114—909.

FISHING IN NAVIGABLE WATERS.—The regulation of fishing in the navigable waters of the state is within the power of the legislature. Woodard, 123—710.

CRIME COMMITTED IN ANOTHER STATE.—The legislature of this state can not define and punish crimes committed in another state. Knight, 4 (Tay.), 44.

NINE MEMBERS OF GRAND JURY INSTEAD OF TWELVE.—An act of the legislature making the concurrence of nine members of the grand jury sufficient, is unconstitutional. Barker, 107—913.

CONTEMPT.

SEC. 91. Disobedience to order; punishment.

SEC. 92. What constitutes contempt.

SEC. 93. Punishment for contempt.

SEC. 94. Court may punish summarily.

SEC. 95. Who may punish.

SEC. 96. Commissioners may punish.

SEC. 97. When offender to appear and show cause.

SEC. 98. Punish as for contempt.

SEC. 99. Proceedings as for contempt.

SEC. 100. What necessary to sustain proceeding.

SEC. 101. Railroad officers; contempt.

Sec. 91 (500). Disobedience to order; punishment. C. C. P., s. 274. 1869-'70, c. 79, s. 3.

If any person, party, or witness, disobey an order of the court or judge or referee, duly served, such person, party or witness, may be punished by the judge as for a contempt. And in all cases of commitment under this sub chapter, the person committed may in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the judge committing him, or the judge having jurisdiction, on such terms as may be just.

DEFENDANT MAY BE INDICTED AS WELL AS PUNISHED FOR CONTEMPT.—If the act which constitutes the contempt is an offence against the criminal law, it may be prosecuted as such though the contempt has already been punished. Griffin, 98—225.

ALTERNATIVE JUDGMENT.—A sentence to "pay a fine of \$40, and in default thereof be imprisoned thirty days," is erroneous, since alternative judgments are not allowed. Deaton, 105—59.

Sec. 92 (648). What constitutes contempt. 1868-'9, c. 177, s. 1. 1870-'1, c. 216, ss. 2. 3.

Any person guilty of any of the following acts may be punished for contempt:

(1) Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due its authority;

(2) Behavior of the like character committed in the presence of any referee or referees, while actually engaged in any trial or hearing pursuant to the order of any court, or in the presence of any jury while actually sitting for a trial of a cause, or upon any inquest or other proceedings authorized by law;

(3) Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court;

(4) Wilful disobedience of any process or order lawfully issued by any court;

(5) Resistance wilfully offered by any person to the lawful order or process of any court;

(6) The contumacious and unlawful refusal of any person to be sworn as a witness, or when so sworn, the like refusal to answer any legal and proper interrogatory;

(7) The publication of grossly inaccurate reports of the proceedings in any court, about any trial, or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for a contempt in publishing a true, full and fair report of any trial, argument, decision or proceeding had in court;

(8) Misbehavior of any officer of the court in any official transaction;

(9) The several acts, neglects and omissions of duty, malfeasances, misfeasances, and nonfeasances, above specified and described, shall be the only acts, neglects and omissions of duty, malfeasances, misfeasances and nonfeasances which shall be the subject of contempt of court. And if there be any parts of the common law now in force in this state which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances and nonfeasances besides those specified and described above, the same are hereby repealed and annulled.

COSTS—PRIMA FACIE GUILTY.—One who is *prima facie* guilty of a contempt in disobeying an order of court may be required to pay the costs,

though he purge himself of any intentional disobedience to the order and the rule is discharged. *Bond v. Bond*, 69—97.

COUNTY COMMISSIONERS—MANDAMUS.—County commissioners can not be put in contempt for failure to pay a debt against the county in obedience to a writ of *mandamus*, when the fund raised by taxation is the full constitutional limit, and all of it is required to meet the necessary expenses of the county government. *Cromartie v. Commissioners*, 87—134.

JUDGMENT AFFIRMED BY SUPREME COURT BECOMES FINAL.—After a judgment of a subordinate court imposing a punishment for disobedience of its order has been affirmed by the supreme court it becomes final, and the superior court has no power to remit or modify it. *Griffin*, 98—225.

ADVICE OF ATTORNEY NO EXCUSE.—A party who intentionally violates an interlocutory judgment of the court is guilty of contempt, although he may have acted in good faith upon professional advice honestly given. *Green v. Griffin*, 95—50.

ALIMONY NOT A DEBT.—An allowance decreed to a wife pending an action by her against her husband for divorce is not a debt within the meaning of the constitution, and the defendant may be held to answer a rule for contempt in default of payment. *Pain v. Pain*, 80—322.

FINDINGS OF FACT BY JUSTICE NOT CONCLUSIVE.—Though on appeal from the superior to the supreme court the findings of fact by the superior court are conclusive, it is otherwise on appeal from a subordinate court to the superior court, since the case is to be heard in the superior court *de novo*, and it is the duty of the judge to review the findings of fact of the subordinate court as well as the rulings of law, and the judge, in furtherance of justice, may hear additional testimony, either orally or by affidavit, in making up his own findings of fact. *Deaton*, 105—59.

CLERK OF SUPERIOR COURT REFUSING TO SEND TRANSCRIPT.—A clerk who wilfully refuses to make out the transcript of a record on appeal may be attached for contempt. *Tegan-tossee v. Rogers*, 2 Hawks, 567.

DISAVOWAL OF INTENT NOT SUFFICIENT, WHEN.—One who wilfully disobeys a judicial mandate is guilty of contempt whether an indignity to the court or contempt of its authority was intended or not, and a disavowal of the imputed intent can not purge the contempt nor exonerate the defendant. The rule that a disavowal of the intent purges the contempt is confined to "the class of cases where the intention to injure constitutes the gravamen" of the offence. *Baker v. Cordon*, 86—116.

MISTAKE AS TO THE MEANING OF DOUBTFUL LANGUAGE AN EXCUSE.—A mistaken interpretation of doubtful language used in an order of court is a defence to a charge for contempt in disobeying the order, but where the language is plain and the attempt is made to escape the force and defeat the manifest purposes of the order by indirection, the penalty must be enforced, or the court would be unable to perform many of its most important functions. *Baker v. Cordon*, 86—116.

JURY NOT ALLOWED.—The defendant in contempt proceedings is not entitled to a jury trial upon the controverted facts, though the judge, in his discretion, may avail himself of a jury and have their verdict upon a disputed and doubtful matter of fact. *Deaton*, 105—59.

FAILURE TO PAY MONEY INTO COURT UNDER ORDER.—Where a party is ordered to pay money into court or be attached for contempt in failing to do so, and swears that after every effort it is out of his power to pay it, the rule will be discharged, since the court will not require an impossibility nor imprison a man perpetually for a debt; but where, on a return to the rule, he does not swear that he can not borrow the money, but does show that he has some personal property, though exempt from seizure under final process for the payment of debts, the rule will not be discharged, since his personal property exemption is not more sacred than the money which he wrongfully withholds. *Smith v. Smith*, 92—304.

CONSTITUTION—TAMPERING WITH JURY.—Giving hand-bills, on a day before the beginning of a term of court, to a juror summoned to serve at such term when a case in which respondent is interested stands for trial, with a request to read the same and hand to the other jurors, said hand-bills containing an account of the suit prejudicial to the adverse party, does not constitute a contempt within the meaning of this statute; and the statute by confining such offence to the acts specified therein, and thus depriving the court of the inherent power to punish for contempt one who attempts, by improper influences brought to bear on a juror, to prevent the course of justice, is not in conflict with Const. N. C., art. 4, section 12, providing that "the general assembly shall have no power to deprive the judicial department of any power of jurisdiction which rightly pertains to it as a co-ordinate department of the government," since the power to punish by a criminal prosecution for an attempt to corruptly influence the administration of justice will afford as ample protection to the court as the exercise of the denied power to act summarily after the perpetration of an act not committed during a session of the court. *Oldham*, 89—23.

INABILITY TO COMPLY WITH AN ORDER OF COURT.—A rule was obtained for alleged contempt in not performing a judgment of court, based on an affidavit declaring a belief that the respondent "is able and has sufficient means" to do so, but which set forth no facts upon which such belief was grounded, and in answer the respondent made affidavit that his inability to perform the judgment resulted from his misfortune and necessitous condition, and that he had no intention or desire to injure the opposing party or disobey the mandate of the court: *Held*, that the rule should have been discharged. *Boyett v. Vaughan*, 89—27.

ANSWER—INTENTION MATERIAL.—In a rule to show cause why a person shall not be punished for contempt the actual intention of the respondent is material, in which respect it differs from an indictment for the like offence; therefore, where the respondent meets the words of the rule by disavowing upon oath any intention of committing a contempt of the court, or of impairing the respect due to its authority, the rule must be discharged. *Ex parte Moore*, 63—397.

DEFAULTING WITNESS MAY APPEAL.—From analogy to cases in which prosecutors are taxed with costs, an appeal from a judgment in a proceeding for contempt against a defaulting witness in a prosecution against R should be entitled "State v. R.; appeal by A, defaulting witness." *Aiken*, 113—651.

MAYOR MAY PUNISH.—The authority to punish for contempt given to justices by section 651 of The Code, is extended to mayors by section 3818 of The Code. *Aiken*, 113—651.

OFFICERS.—An officer who refuses to obey an order of the court directing him to return the process on and bond on a *ca. sa.* on the *first* day of the court, instead of the *second*, as the law requires, and who sends a contemptuous message to the court inreply to its order, may be fined for contempt. *Ex parte Summers*, 27 (5 Ire.), 149.

MAY BE DISCHARGED ON HABEAS CORPUS.—Where the court states the facts on which it acts in a proceeding for contempt, a revising tribunal may, on *habeas corpus*, discharge the parties, if it clearly appear that the facts do not amount to a contempt. *Ex parte Summers*, 27 (5 Ire.), 149.

CLERK REFUSING TO MAKE TRANSCRIPT.—Where the clerk of the superior court wilfully refuses to make out the transcript on appeal, the supreme court will, on affidavit and motion, grant a rule upon him to show cause why he should not be attached for contempt. *Tegan-tosse v. Rogers*, 9 (2 Hawks), 567.

PRACTICE EXPLAINED.—The statute and punishment construed, practice explained, and the sufficiency of the return considered. *Kane v. Haywood*, 66—1.

Sec. 93 (649). Contempt; its punishment. 1868-'9, c. 177, s. 2.

Punishment for contempt for matters set forth in the preceding section, shall be by fine or imprisonment or both, in the discretion of the court. The fine not to exceed two hundred and fifty dollars, and the imprisonment not to exceed thirty days.

FINE BELONGS TO THE STATE.—A judge has no authority to direct that a fine for contempt, imposed on a sheriff for failure to obey an order of the court directing him to deliver goods to the defendant in a case, shall be paid to the defendant as damages for such unlawful detention of the goods, since a fine for contempt is a punishment for a wrong to the state and goes to the state. *Rhodes*, 65—518.

A fine for a contempt for disobeying an injunction against the sale of goods can not be ordered to be paid to the party aggrieved, since the state alone is entitled to the penalty. *Morris v. Whitehead*, 65—637.

PUNISHMENT INDEFINITE IN DURATION.—A judgment that county commissioners, who have been adjudged in contempt for failure to levy and collect a sufficient tax to pay a debt in obedience to a writ of *mandamus*, be "imprisoned in the common jail until they pay to the plaintiff out of the general fund in the county treasury" a certain sum, is not in contravention of this statute, since the force of the *mandamus* is exhausted by rendering obedience, and every court has the power to coerce obedience to its lawful orders. *Cromartie v. Commissioners*, 85—211.

PUNISHMENT BY IMPRISONMENT.—Where the act constituting the contempt comes within the classes mentioned in the next preceding section, the court has no power to punish by imprisonment of indefinite duration, but may so punish when the proceeding is "as for contempt" under section 95 (*The Code*, section 654, *et seq.*) *Cromartie v. Commissioners*, 85—211.

FINE.—A fine for contempt is a punishment for a wrong to the state and goes to the state, and can not be ordered paid to a party to a suit. In the matter of *Rhodes*, 65—518.

Sec. 94 (650). Court may punish summarily R. C., c. 34, s. 117. 1868-'9, c. 177, s. 3.

Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offence to be specified on the record, and a copy of the same to be attached to every committal, attachment or process in the nature of an execution founded on such judgment or order.

THE OBJECT OF THE STATUTE.—The object of the statute is to furnish evidence against a magistrate on trial for a malfeasance in office by an abuse of power, and to enable the person punished to obtain such redress as, by the law, he might be entitled to. *Deaton*, 105—59.

EFFECT OF THE STATUTE—HABEAS CORPUS.—The requirement that the court shall find the facts constituting the contempt and have them spread upon the record does not have the effect to give the right to an appeal nor to a writ of *certiorari* where the contempt is committed in the presence of the court, but such facts when found and spread upon the record may authorize a revising tribunal, on a *habeas corpus*, to discharge the party if it plainly appear that the facts as found in law do not justify a sentence for contempt. *Deaton*, 105—59.

APPEAL.—A judgment imposing a punishment for contempt committed in open court is final, and can not be reviewed either by appeal or *certiorari*. The power to commit or fine for a contempt is essential to the existence of every court, and must necessarily be exercised in a summary manner. Woodfin, 27 (5 Ired.), 199.

Defendant has no right of appeal when the contempt is committed in the presence of the court. Mott, 49 (4 Jones), 439.

Where the contempt is committed in the presence of the court, or near enough to impede or interfere with its business, no appeal lies to any other court. Deaton, 105—59.

Sec. 95 (651). Who may punish. 1868-'9, c. 177, s. 4.

Every justice of the peace, referee, commissioner, clerk of the superior court, inferior court, criminal court, or judge of the superior court, or justice of the supreme court, shall have power to punish for contempt while sitting for the trial of causes or engaged in official duties.

PROBATE COURT MAY PUNISH FOR CONTEMPT.—A public administrator, after order made for his removal and the appointment of another in his place, may be ordered to make return and settlement of estates in his hands, and a refusal to obey such order is a contempt which the probate court has the power to punish. Brinson, 73—278.

MAYOR MAY PUNISH FOR CONTEMPT.—The mayor of a town has jurisdiction to punish for contempt, though not named among the officers having that power as prescribed in this statute, since every court inherently possesses such power independent of statutory enactment, besides, under The Code, section 3818, a mayor is constituted an inferior court and given the powers of a justice of the peace. Deaton, 105—59.

WITNESS BEFORE REFEREE REFUSING TO ANSWER.—Where, in proceedings supplementary to execution, a witness is examined before a referee appointed to take and certify the examination of such witness and to make discovery concerning the property and effects of a certain corporation, the defendant in the execution, said witness being the treasurer and agent of the corporation, no trial can be said to take place before the referee, and a contempt in refusing to answer questions on such examination must be punished by the court making the reference. LaFontaine v. Southern Underwriters, 83—132.

Sec. 96 (652). Commissioners may punish. 1868-'9, c. 177, s. 5.

The board of commissioners of each county shall have power to punish for contempt for any disorderly conduct or disturbance, tending to interrupt them in the transaction of their official business.

Sec. 97 (652). When offender to appear and show cause. 1868-'9, c. 177, s. 6.

Whenever the contempt shall not have been committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. At the time specified in

the order, the person charged with the contempt may appear and answer, and, if he fail to appear and show good cause why he should not be attached for the contempt charged, he shall be punished as provided in this chapter.

COURT CAN NOT FIND THE EXISTENCE OF AN INTENT DISAVOWED IN THE ANSWER.— Respondent having been served with a rule to show cause why he should not be attached for contempt for failure, in obedience to a writ of *habeas corpus*, to produce the body of a child alleged to be in the custody of himself and its grandmother, answered on oath that if his course in the matter was wrong it was through ignorance and with no disrespect to the court nor disposition to disobey its orders. On the hearing the court found as facts that respondent, after service of the *habeas corpus* on him, sent notice to the grandmother in whose possession the child then was to enable her to avoid service of the *habeas corpus* on herself, and that, after being put under the rule for the alleged contempt, he aided in sending the child to another state and there instituted legal proceedings with intent to hinder, delay or prevent the execution of the orders of the court. Respondent never had possession and control of the child and his answer so averred: *Held*, that the court could not find an intent to disobey or prevent the execution of the orders of the court in sending notice to the grandmother or assisting in removing the child and instituting the suit, such intent being negated by the answer. Walker, 82—95.

Sec. 98 (654). Punish as for contempt. 1868-'9, c. 177, s. 7.

Every court of record shall have power to punish as for contempt:

(1) Any clerk, sheriff, register, solicitor, attorney, counsellor, coroner, constable, referee, or any other person in any manner selected or appointed to perform any ministerial or judicial service, for any neglect or violation of duty or any misconduct, by which the rights or remedies of any party in a cause or matter pending in such court may be defeated, impaired, delayed or prejudiced for disobedience of any lawful order of any court or judge, or any deceit or abuse of any process or order of any such court or judge;

(2) Parties to suits, attorneys, and all other persons for the non-payment of any sum of money ordered by such court, in cases where execution can not be awarded for the collection of the same;

(3) All persons for assuming to be officers, attorneys or counsellors of the court, and acting as such without authority, for receiving any property or person which may be in custody of any officer by virtue of any order or process of the court, for unlawfully detaining any witness or party to any suit, while going to, remaining at, or returning from the court where the same may be set for trial, or for the unlawful interference with the proceedings in any action;

(4) All persons summoned as witnesses in refusing or neg-

lecting to obey such summons to attend, be sworn, or answer, as such witness;

(5) Parties summoned as jurors for impropriety, conversing with parties or others in relation to an action to be tried at such court or receiving communication therefrom;

(6) All inferior magistrates, officers and tribunals for disobedience of any lawful order of the court, or for proceeding in any matter or cause contrary to law, after the same shall have been removed from their jurisdiction;

(7) All other cases where attachments and proceedings as for contempt have been heretofore adopted and practiced in courts of record in this state, to enforce the civil remedies or protect the rights of any party to an action.

TO WHAT CLASS OF ACTIONS APPLICABLE.—The proceedings as for contempt prescribed in this section apply only to civil actions except subsections 4, 5 and 6. Deaton, 105—59.

HOW PROCEEDINGS COMMENCED.—Proceedings “as for contempt” should always be based on affidavits, though this is not required in proceedings for contempt proper. Deaton, 105—59.

Sec. 99 (655). Proceedings as for contempt, how prosecuted. 1868-'9, c. 177, s. 8.

Proceedings as for contempt shall be prosecuted and carried on as provided in other special proceedings.

Sec. 100 (656). What necessary to sustain proceeding. 1868-'9, c. 177, s. 9.

To sustain a proceeding as for contempt, the act complained of must have been such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court.

Sec. 101. Railroad officers; contempt. 1885, c. 221.

When any action is brought against any railroad company before a justice of the peace, the justice before whom said action is made returnable shall have power to issue a subpoena to any county within the limits of the state, commanding the president, or any officer, director, agent or any one in the employment of said company, to appear before him at the place or time of trial and to produce such books, cards, and other papers as the justice shall deem proper and to give evidence in said cause, and each witness summoned as aforesaid, failing or refusing to appear and testify, and produce the books and papers as aforesaid, in obedience to said writ, shall be deemed guilty of a contempt of court, and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

CONTRACTORS OR ARCHITECTS.

Sec. 102. Contractors must furnish statement of sums due laborers to owner of building built or repaired. 1887, c. 67.

Any contractor or architect who shall fail to furnish an itemized statement of the sums due to every one of the laborers, mechanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, shall be guilty of a misdemeanor, and upon conviction, shall be fined or imprisoned, or both, in the discretion of the court.

NOTE.—Laws 1887, c. 67, requires the contractor to furnish the owner, or his agent, of any building or vessel built or repaired, an itemized statement of the sums due laborers before receiving the contract price, and the owner to retain sufficient to pay laborers; and laws 1891, c. 203, makes the provisions of the act of 1887 applicable to all contracts and sub-contracts made by any railroad company or other corporation or their authorized agents.

"COOLING TIME."

See HOMICIDE—this title.

CORPORATIONS.

Sec. 103 (217). Manner of service of summons. C. C. P., s. 82. 1874-'5, c. 168, s. 1.

The summons shall be served by delivering a copy thereof in the following cases:

(1) If the action be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof: *Provided*, that any person receiving or collecting moneys within this state for, or on behalf of, any corporation of this or any other state or government, shall be deemed a local agent for the purpose of this section; but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein, or when the plaintiff resides in the state,

or when such service can be made within the state, personally upon the president, treasurer or secretary thereof.

HOW CORPORATION INDICTED.—This section applies to criminal actions as well as to civil, and the proper mode of bringing into court a corporation charged with a criminal offence is by issuing a summons and serving a copy on one of its officers or agents. *Western N. C. R. R. Co.*, 89—584.

A copy of the charter of a foreign corporation, certified by the secretary of state where it was incorporated, under his official signature and the state seal, is admissible in North Carolina to prove the fact of incorporation. *Turner*, 119—841.

Where an indictment alleges the ownership of property by a corporation, it is sufficient to show that the corporation carried on business under the corporate name set out in the indictment without producing the certificate of incorporation, or a copy thereof. *Turner*, 119—841.

COSTS.

SEC. 104. Costs to be paid by prosecutor in certain cases.

SEC. 105. When prosecutor imprisoned for non-payment.

SEC. 106. Court to direct prosecutor to pay costs in certain cases.

SEC. 107. Party convicted to pay costs; if accused acquitted, complainant to pay.

SEC. 108. Convicted persons must pay costs.

SEC. 109. Expenses of arresting fugitives, how paid.

SEC. 110. Costs of proceedings before judges and magistrates.

SEC. 111. Day to be set for trial of crimes; witnesses not to attend until such day.

SEC. 112. Expenses when prisoner taken to another county, how paid.

Sec. 104 (737). Costs to be paid by prosecutor in certain cases. 1799, c. 4, s. 19. 1800, c. 558, s. 1. 1868-'9, c. 277. 1874-'5, c. 151, s. 1. 1879, c. 49, s. 1. R. C., c. 35, s. 37. C. C. P., s. 560. 1889, c. 34.

In all criminal actions, if the defendant be acquitted, *nolle prosequi* entered, or judgment against him arrested, or if the defendant shall be discharged from arrest for want of probable cause, the costs including the fees of all witnesses summoned for the accused, whom the judge, court or justice of the peace before whom the trial took place shall certify to have been proper for the defence, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the judge, court or justice shall be of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. And every judge, court or justice is hereby fully authorized to determine who the prosecutor is at any stage of a criminal proceeding, whether before or after the bill of indictment shall have

been found, or the defendant acquitted: *Provided*, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record.

NOTICE OF MOTION.—An announcement in open court, upon the calling and continuance of a case, that a motion would be made at next term to mark a witness as prosecutor, the witness being present, is sufficient notice of the motion. Norwood, 84—794.

A notice given by defendant alone to have the prosecutor marked as such and adjudged to pay the costs, is sufficient, and the solicitor may make the motion without further notice. Hughes, 83—665.

Where the prosecutor testifies in court in the investigation of facts upon the motion to mark him as prosecutor and tax him with the costs, he has sufficient notice of the motion. Hamilton, 106—660.

The court has no power to mark one as prosecutor without his consent and without notice to show cause. Crosset, 81—579.

The presence of a prosecutor to convict the defendant is, in law, a presence to answer the latter in costs for the false clamor if the prosecution is adjudged frivolous, and a judgment against the prosecutor for such costs is valid, though rendered in his absence and without notice. Spencer, 81—519.

One marked as prosecutor on a bill of indictment is charged with knowledge of all subsequent proceedings in the case, and a motion to set aside an irregular judgment taxing him with the costs of the prosecution can not be made more than a year after the rendition of the judgment. Horton, 89—581.

An erroneous judgment can not be set aside at a subsequent term of the court, and the only remedy is by appeal. *Ib.*

PROSECUTOR MAY APPEAL.—A prosecutor may appeal from a judgment taxing him with costs. Byrd, 93—624.

APPEAL BOND COVERS WHAT COSTS.—On appeal to the supreme court the appeal bond covers costs, both of the supreme court and the superior court. Patterson, 27 (5 Ired.), 89.

PROSECUTOR'S NAME MUST BE MARKED ON INDICTMENT.—No person is to be regarded as a prosecutor within the meaning of the statute making him liable to pay costs unless his name is marked as such on the bill of indictment. Lupton, 63—483.

ORDER MADE EX MERO MOTU.—The court *ex mero motu* may order that a prosecutor be taxed with the costs. Adams, 85—560.

PROSECUTOR'S MOTIVE IMMATERIAL.—If the prosecutor had good cause, though his motives be of the worst kind, he ought not to pay costs. Forsyth, 1 (Tay. Rep.), 16.

NO APPEAL WHERE EVIDENCE SUPPORTS JUDGMENT.—Where there is evidence to support the order taxing the prosecutor with the costs on the ground that the prosecution was frivolous or malicious the judgment will not be reviewed by the supreme court. Whitley, 123—728.

MAY APPEAL FROM JUSTICE.—An appeal lies from the judgment of a justice of the peace taxing the prosecutor with the costs, such taxing being in the nature of a civil judgment. Morgan, 120—563.

FINDINGS BY JUSTICE REVIEWABLE.—The findings of fact of a justice of the peace in taxing the costs against the prosecutor are reviewable in the superior court. Morgan, 120—563.

FINDINGS OF SUPERIOR COURT NOT REVIEWABLE.—The findings of fact by

the superior court, on a motion to tax the prosecutor with the costs, are not reviewable in the supreme court. Such findings by a justice are reviewable in the superior court. The reason for this distinction is given in *In re Deaton*, 105—62, 63. *Morgan*, 120—563.

STATE CAN NOT APPEAL.—The state can not appeal from the judgment of the superior court declining to tax a prosecutor with the costs of an action tried in a justice's court. *Morgan*, 120—563.

No appeal lies in behalf of the state from a judge's finding of fact that the person taxed by a justice of the peace as prosecutor was not in fact such. *Morgan*, 120—563.

DEFENDANT'S ATTORNEY MAY GIVE NOTICE OF MOTION.—Notice of the motion to tax the prosecutor with the costs may be given by the defendant's attorney. *Jones*, 117—768.

DEFENDANT'S WITNESSES—FINDING OF FACT.—The finding that the witnesses were necessary for the defence must be made before the prosecutor can be taxed with the fees of such witnesses. *Jones*, 117—768.

PROSECUTOR MARKED ON BILL BEFORE GRAND JURY.—A person marked as prosecutor on a bill before it was acted on by the grand jury is properly adjudged to pay the costs where the prosecution is found not to be required by the public interest. *Baker*, 114—812.

FINDING SUFFICIENT.—A finding by the judge that the prosecution "was not for the public interest," is equivalent to a finding that it "was not required by the public interest." *Baker*, 114—812.

PAYMENT OF DEFENDANT'S WITNESSES BY COUNTY.—Where no prosecutor is marked it is in the discretion of the judge to make an order for the payment of defendant's witnesses by the county, and the exercise of such discretion is not reviewable. *Ray*, 122—1095.

It is discretionary with the trial judge to refuse to order the witnesses of the defendant paid by the county. *Hicks*, 124—.

SUCCESSING JUDGE MAY HEAR MOTION.—Upon motion and notice to show cause the prosecution may be adjudged frivolous by another judge at a subsequent term. *Sanders*, 111—700.

FINDING OF FACTS NECESSARY.—It is error to tax a prosecutor with the costs without a previous finding of facts by the court. *Roberts*, 106—662.

BILL IGNORED BY THE GRAND JURY.—A prosecutor can not be taxed with the costs of the prosecution when the grand jury returns the indictment "not a true bill." Following *State v. Cockerham*, 1 Ired., 381. *Horton*, 89—581.

The prosecutor can not be taxed with the costs when the bill is ignored by the grand jury. *Gates*, 107—832.

Sec. 105 (738). Prosecutor, when imprisoned for non-payment of costs. R. C., c. 35, s. 37. 1800, c. 558, s. 1. 1879, c. 49, s. 2. 1881, c. 176.

Every such prosecutor may be adjudged not only to pay the costs, but he shall also be imprisoned for the non-payment thereof, when the judge, court, or justice of the peace before whom the case was tried shall adjudge that the prosecution was frivolous or malicious.

SOLICITOR'S FEE CAN NOT BE TAXED.—Where the prosecutor is adjudged to pay the costs on the ground that the prosecution was frivolous or malicious, the solicitor's fee can not be taxed against him. *Dunn*, 95—698.

NO APPEAL.—No appeal lies from a judgment taxing a prosecutor with

the costs because the prosecution was "frivolous and not required by the public interest." The finding of fact is not reviewable. *Hamilton*, 106—660.

Sec. 106 (1204). Pay of witnesses in state cases, court to direct the prosecutor to pay costs in certain cases. R. C., c. 35, s. 37. 1800, c. 558, s. 1. 1879, c. 49, c. 92, s. 2. 1881, c. 176.

All witnesses summoned or recognized in behalf of the state shall be allowed the same pay for their daily attendance, ferriage and mileage as is allowed to witnesses attending in civil suits; and such fees for attendance shall be paid by the defendant, only upon conviction, confession or submission; and if the defendant be acquitted on any charge of an inferior nature, or a *nolle prosequi* be entered thereto, the court shall order the prosecutor to pay the costs, if such prosecution shall appear to have been frivolous or malicious; but if the court shall be of opinion that such prosecution was neither frivolous nor malicious, and a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, nevertheless, order the prosecutor to pay the attendance of such unnecessary witnesses, if it appear that they were summoned at his special request.

Sec. 107 (895). Party convicted to pay costs; if accused acquitted, complainant to pay costs. 1868-'9, c. 178, sub chap. 4, s. 19. 1879, c. 92, s. 3. 1881, c. 176.

The party convicted in a criminal action or proceeding before a justice, shall always be adjudged to pay the costs; and if the party charged be acquitted, the complainant shall be adjudged to pay the costs; and may be imprisoned for the non-payment thereof, if the justice shall adjudge that the prosecution was frivolous or malicious. But in no action or proceeding, commenced or tried in a court of a justice of the peace, shall the county be liable to pay any costs.

Sec. 108 (1211). Convicted persons must pay the costs. R. C., c. 35, s. 46.

Every person convicted of an offence, or confessing himself guilty, or submitting to the court, shall pay the costs of prosecution.

COSTS OF TRANSCRIPT.—The clerk has no right to demand the costs of the transcript to be paid in advance, whether an appeal bond is given, or the appeal is in *forma pauperis*. *Nash*, 109—822.

FEES DUE DEFENDANT'S OWN WITNESSES.—Fees due defendant's own witnesses can not be taxed in the bill of costs and defendant imprisoned for their non-payment. Such fees constitute only a personal debt against defendant which may be enforced by the witnesses by suing out execution. *Wallin*, 89—578.

JUDGMENT NUNC PRO TUNC.—Where judgment is directed by the supreme court to be entered in the court below, both for the punishment and costs, and the court at the succeeding term enters judgment for the punishment only, judgment may be entered at the next term, *nunc pro tunc*, for the costs also against defendant and his sureties on his appeal to the supreme court. Patterson, 27 (5 Ired.), 89.

SOLICITOR'S FEE ON PEACE BOND.—The solicitor is not entitled to a fee on a recognizance to keep the peace. Red, 24 (2 Ired.), 265.

INSOLVENTS—DISCHARGED, WHEN.—There were three indictments against the defendant, to one of which he pleaded guilty, and judgment was suspended on payment of costs. He was found guilty on the other two, on one of which he was sentenced to imprisonment for ten days. After serving the ten days, and twenty days additional, he took the insolvent debtor's oath, and applied for his discharge: *Held*, that he was entitled to his discharge in all three cases. McNeely, 92—829.

NO FEE FOR ENTERING NOL PROS.—Under Code N. C., section 3739, prescribing in detail the fees due clerks, no fee for entering a *nol pros.* can be charged. Section 739, which gives him half fees for entering a *nol pros.* is in conflict with section 3739, which says that his fees "shall be the following, and no other," and the latter statute omits the fee for a *nol pros.* Johnson, 101—711.

PRISONER TO BE DISCHARGED, WHEN—WORK-HOUSE.—Upon complying with the provisions of The Code, section 2967, *et seq.*, a prisoner is entitled to be discharged from imprisonment for the non-payment of a fine and costs, notwithstanding a work-house has been established by the county, in accordance with section 786. Williams, 97—414.

REMEDY WHEN CLERK REFUSES TO ADMINISTER OATH.—Defendant, after giving the required notice of twenty days, made application to the clerk to be allowed to file his schedule, surrender his property and take the required oath, in order to be discharged from custody, and being refused, sued out a writ of *habeas corpus* before a judge holding court in an adjoining district, who upon hearing the facts ordered the clerk to administer the oath, appointed a trustee to take charge of the property, and that, upon taking the oath, defendant be discharged from further confinement: *Held*, that defendant's proper remedy, on being refused the privilege of taking the oath by the clerk, was by appeal to the judge holding the courts of the district, and not by *habeas corpus*; but it being made to appear to the court that defendant has been released under the writ, and that he has complied with all the requirements of the statute, the judgment will not be reversed. Miller, 97—451.

One committed for the fine and costs of a criminal prosecution, may be discharged after twenty days upon taking the oath that he has no estate above his personal property exemption. Davis, 82—610.

PARDON, EFFECT OF.—An appeal to the supreme court vacates the judgment below; therefore, in such a case where the supreme court has decided that there was no error, and upon the transcript being returned, the solicitor moved for judgment, and defendant produced an unconditional pardon, he had a right to be discharged without paying costs. Underwood, 64—599.

DEFENDANT PAYS HIS OWN COSTS.—Where the defendant is acquitted, or a *nol pros.* is entered, he is bound to pay his own costs, and none other. Whithed, 7 (3 Murph.), 223.

(See State v. Massey, 104—877 and Const. N. C., art. 1, section 2, which forbids taxing costs of defendant's witnesses against him unless he is convicted.)

DEFENDANT LIABLE FOR WHOLE COSTS WHEN NEW BILL IS SENT.—Where an indictment is found and defendant recognized to appear from term to term, and afterwards a *nol pros.* is entered upon a defect being discov-

ered in the bill, and a new bill is found for the same offence, neither the defendant nor the witnesses being discharged during the time, the defendant is liable for the attendance of the witnesses from the finding of the first bill. *Hashaw*, 4 (*Repos. and Tay.*), 230.

TAXING COSTS AGAINST COUNTY.—The costs of witnesses "necessary" for the defendant can not be taxed against the county when the indictment is quashed. *Massey*, 104—877.

Const. N. C., art. 1, section 2, which forbids that any defendant shall be taxed with the costs of necessary witnesses summoned by him, unless found guilty, does not, *ex vi termini*, authorize such costs to be taxed against the county; it only exempts the acquitted defendant from liability. *Ib.*

The resident judge of a district can not grant a judgment taxing a county with the payment of costs at chambers and in vacation, when at the time his authority in the discharge of his ordinary official duties must be exercised in another district. *Ray*, 97—510.

JUDGMENT DISCHARGED BY EXECUTION.—Where defendant confesses judgment, with sureties for the fine and costs, the original judgment is discharged, and after an execution issued against defendant and his sureties is returned unsatisfied, defendant can not be again ordered into custody until the fine and costs are paid. *Cooley*, 80—398.

COSTS NO PART OF PUNISHMENT.—The order for the payment of costs does not constitute any part of the punishment, the legal effect of a conviction and judgment being to vest the right to the costs in those entitled to them. *Crook*, 115—760.

Where judgment is suspended, the payment of part of the costs is not a performance of part of the sentence. *Crook*, 115—760.

CLERK FAILING TO SEND COMPLETE TRANSCRIPT.—Where the clerk fails to send up as a part of the transcript the drawing and swearing in of the grand jury he will not be allowed his costs for making and sending up the transcript of the record. *Cameron*, 122—1074.

WHEN SUPREME COURT WILL HEAR QUESTION OF COSTS.—Where the subject matter of an action has been disposed of in any way the supreme court will not pass upon the merits of the original matter in litigation merely to ascertain which side ought to have won and which ought to pay the costs, since the court will not waste its time upon an abstract question; but where the question is whether a particular item is properly charged as costs, or, whether, taking the case below as rightly decided, the costs are properly adjudged, these questions are reviewable on appeal. *Horne*, 119—853.

COSTS OF FIRST TRIAL WHEN DEFENDANT ACQUITTED ON SECOND.—The rule that costs follow the final judgment applies in criminal as in civil cases; hence, where a prisoner was first convicted but was afterwards acquitted on a new trial, the costs of his witnesses are taxable against the county in both trials, upon order of the court. *Horne*, 119—853.

FAILURE TO PAY WORKED ON ROADS.—One who fails to pay, or to properly secure the payment of, costs or fine may be worked on the public roads. *Yandle*, 119—874.

WHEN JUSTICE HAS JURISDICTION.—Where an appeal to the superior court from a judgment of a justice of the peace, in a matter in which the justice had final jurisdiction, a *nol pros.* was entered by the solicitor, it was error to tax the county with the costs accrued in the superior court. *Shuffler*, 119—867.

The state can in no event be taxed with the costs of a proceeding in which a justice of the peace has final jurisdiction. *Morgan*, 120—563.

Sec. 109 (1170). Governor may draw on the state treasurer for money necessary to pay expenses of arresting fugitives from justice. 1870-'1, c. 82.

In all cases where the governor of the state has made a requisition on the governor of another state for any fugitive from justice and has sent an agent to receive said fugitive, it shall be lawful for the governor to issue a warrant on the state treasurer for the amount of money necessary to pay the expenses of said agent and other costs in the arresting of said fugitive from justice, to be paid by the treasurer of the state.

Sec. 110 (1173). Of costs in proceedings before judges and magistrates. 1868-'9, c. 178, sub chap. 2, s. 40.

In all cases of criminal complaints before justices of the supreme court, judges of the superior and criminal courts, justices of the peace and other magistrates having jurisdiction of such complaints, the officers entitled by law to receive fees for issuing or executing process, shall not be entitled to demand them in advance. Such officers shall indorse the amounts of their respective fees on every process issued or executed by them, and return the same to the court to which it is returnable.

Sec. 111 (1203). Superior and inferior courts to set a day for the trial of crimes; witnesses not to attend till such day. R. C., c. 35, s. 36. 1822, c. 1133, ss. 2, 3, 4. C. C. P., s. 229.

The courts shall appoint a special day in their respective terms, on which the business of the state shall be taken up, and the court may proceed therewith till the whole is finished; and no witness recognized or summoned to attend on indictment found shall be entitled to compensation for attending previous to the day so appointed: *Provided*, that in capital cases witnesses and other persons may be required on the day preceding the day appointed as aforesaid; and the clerk of the court in which a day is thus appointed shall give notice thereof at the court-house door and at three or more public places in the county, and shall issue subpoenas and take recognizances for attendance on such day.

Sec. 112. Expenses when prisoner to be taken to another county, how paid. 1885, c. 262.

When a sheriff or other officer shall arrest a person under a *capias* or other legal process, which requires him to have the person arrested before a court or judge of another county, and such sheriff or other officer shall be obliged to incur expense in the safe delivery of such person by reason of his failing to give bond for his appearance, the sheriff or other officer shall file with the court or judge issuing the *capias* or other legal process and with the

register of deeds an itemized and sworn account of such expenses, which shall be presented by the register to the board of commissioners at their next regular meeting to be audited by them. That such sworn statement shall be received by the said board as *prima facie* correct. That upon such auditing the board of commissioners shall cause to be issued to such sheriff or other officer an order on the county treasurer for the amount so audited and allowed by them, and shall notify the court or judge of their action, to the end that the amount so allowed shall be taxed in the costs to the use of the county.

COTTON—SALE OF.

SEC. 113. Sale of cotton within certain hours prohibited.
SEC. 114. Weighing regulated.

SEC. 114. Weigher's oath; failure to take.

SEC. 113 (1006). Cotton, sale of, within certain hours prohibited. 1873-'4, c. 62. 1874-'5, c. 70. 1887, c. 199.

If any person shall buy, sell, deliver or receive, for a price or for any reward whatever, any cotton in the seed, or any unpacked lint cotton, brought or carried in a basket, hamper or sheet, or in any mode where the quantity is less than what is usually baled, or where the cotton is not baled, between the hours of sunset and sunrise, such person so offending shall be guilty of a misdemeanor.

It shall be unlawful for any person to buy, sell, deliver or receive for a price, or for any reward whatever, any cotton in the seed where the quantity is less than what is usually baled, except as hereinafter provided.

The person so buying or receiving seed cotton as aforesaid shall enter upon a book to be kept by him or her for such purpose the date of such buying, or receiving, the number of pounds in each lot, the person or persons from whom bought or received, and the price paid for same per pound, and shall keep said book open to inspection by the public at all business hours of the day.

Any person buying or receiving seed cotton, who shall fail to keep the book as aforesaid, or shall fail or neglect to make therein the entries aforesaid at the time of such buying or receiving, shall be guilty of a misdemeanor, and upon conviction be punished by a fine not exceeding fifty dollars or imprisoned not exceeding thirty days.

In all prosecutions under this act it shall only be necessary for the state to allege and prove that the defendant bought or received the seed cotton as charged, and the burden shall be upon the defendant to show that the provisions of this act have been complied with.

DIAGRAM OF PREMISES.—A plat or diagram of defendant's premises, offered by him to show the position of the yard, house, cotton, etc., for the purpose of illustrating the position of the defendant, and to show that he could not have seen or received the cotton, is competent, though no notice was given the state of its preparation. Whiteacre, 98—753.

ACT CONSTITUTIONAL.—Laws N. C., 1887, c. 81 (amended 1889, c. 319), making it unlawful to buy, sell, deliver or receive seed cotton in certain counties in quantities less than that usually contained in a bale, unless the contract is reduced to writing, signed by the parties in the presence of two witnesses, and entered on the docket of the nearest magistrate within ten days thereafter, is an exercise of the police power of the legislature, and does not conflict with either the state or federal constitution. (Const. N. C., art. 1, sections 1 and 31. Const. U. S., Fourteenth Amendment.) Moore, 104—714.

INDICTMENT—MANNER OF CARRYING COTTON.—When the indictment fails to set forth the manner in which the cotton was brought or carried, a motion in arrest of judgment will be sustained. Whiteacre, 98—753.

FORMER CONVICTION.—JURISDICTION.—After having been presented by the grand jury for failure to make a sworn statement of his purchases, defendant was tried and convicted before a justice of the peace more than six months after the commission of the offence, but the fact of such presentment was then unknown either to defendant or the justice: *Held*, that the justice had concurrent jurisdiction after the lapse of six months, and that the plea of former conviction should be sustained. Roberts, 98—756.

Sec. 114 (1007). Cotton; weighing of regulated. 1874-'5, c. 58, ss. 1, 3.

If any weigher or purchaser of cotton shall make any deduction from the weight of any bag, bale or package of lint cotton, for or on account of the draft, turn or break of the scales, steel-yards, or other implement used in weighing the same, or for any other cause except as herein allowed, the person so offending shall be guilty of a misdemeanor, and fined three hundred dollars or imprisoned, in the discretion of the court: *Provided*, that the weigher may make such proper deduction as shall be agreed on by him, and the seller, or his agent, for water, dirt or other foreign substance, in or on such bag, bale, or package of cotton, or for other just cause.

Sec. 115 (1008). Cotton-weigher's oath, the failure of the weigher to make, subscribe, and file with the register of deeds, a misdemeanor. 1874-'5, c. 58, s. 2.

Every public weigher of cotton shall, before entering on the duties of his office, make and subscribe the oath prescribed for cotton weighers, which, when made, shall be filed in the office of

the register of deeds for the county in which the person acts as weigher, and said register shall make a note of the same, and any person acting as weigher without making and filing the oath, shall be guilty of a misdemeanor, and shall be fined twenty-five dollars for every bag, bale, or package of cotton which he shall have unlawfully weighed before being qualified to do so.

COUNTERFEITING.

See FORGERY.

COUNTIES.

The civil division of the state into counties, etc., must be taken notice of judicially by the courts. *Glasgow*, 1 (Conf.), 176.

The courts take judicial notice of the political sub-divisions of the state, and hence, where in an "omnibus" act prohibiting the sale of spirituous liquors in certain localities, an alphabetical list of the counties is given, each name being followed by a list of the places within a certain distance of which the sale or manufacture of whiskey is prohibited, the courts will take judicial notice of the fact that the names in alphabetical order are the names of counties, although the word "county" nowhere appears in the act. *Snow*, 117—774.

CRIME AGAINST NATURE.

See also RAPE.

Sec. 116 (1010). Crime against nature. R. C., c. 34, s. 6. 1868-'9, c. 167, s. 6. 25 Hen. VIII., c. 6. 5 Eliz., c. 17.

If any person shall commit the abominable and detestable crime against nature, with mankind or beast, he shall be imprisoned in the penitentiary not less than five nor more than sixty years.

CRIMES.

WHAT CONSTITUTES A CRIME.—Where a statute makes an act unlawful, or imposes a punishment for its commission, such act becomes a crime without any express declaration that it shall be a crime. Pierce, 123—745.

If the legislature prescribes that a certain act shall be punishable by either fine or imprisonment, or forbids it generally, such act becomes a crime. Ostwalt, 118—1212.

A belief that an unlawful act is lawful is no justification because when the act is unlawful and voluntary the *quo animo* is necessarily inferred from the act itself. Presnell, 34 (12 Ire.), 103.

Where there is a criminal intent to commit a felony, and some act is done amounting to an attempt to accomplish the purpose without doing it, the offender is indictable for a misdemeanor. Jordan, 75—27.

But an intent without any culpable act is not indictable. Penny, 4 (1 Car. L.), 517 (130.)

It is no offence to entice an infant from the service of his parent. Rice, 76—194.

An intent to commit a felonious act, where the intent is only a misdemeanor, merges in the felony, if the act be committed; but if the *intent alone* is a felony of the same grade with the act itself, there is no merger. Jesse, 20 (3 D. & B.), 98.

The Cherokee Indians are subject to the criminal laws of the state. Ta-cha-na-tah, 64—614.

The legislature can not define and punish crimes committed in another state. Knight, 1 (Tay.), 65 (44).

While the legislature may require any person appointed to an office to accept it under pain of indictment, yet there is no principle of the common law making such offence criminal. McEntyre, 25 (3 Ired.), 171.

CRIMINAL STATISTICS.

Sec. 117. Criminal statistics to be furnished by clerks. 1889, c. 341.

Within twenty days after the adjournment of any criminal court of record, or of any term of the superior court at which criminal causes were triable, the clerk thereof shall transmit to the office of attorney-general of state a duly certified statement of the number of indictments finally disposed of at such court, specifying the number for each separate offence, the number on which convictions were had and on which defendants were acquitted, and of indictments against persons who were convicted on confession, and against persons who were discharged without trial, and also the name, age, occupation, sex, race and offence of every person convicted at such court or (pleading guilty) of any offence,

together with such other items of information in relation to such convicts and their offences as the attorney-general shall require.

The report required by this chapter shall be made in the form prescribed by the attorney-general.

For every neglect of any clerk of said court he shall forfeit the sum of fifty dollars, to be adjudged in the superior court of Wake county on the motion of the attorney-general, whose duty it is hereby made to make such motion at the first term of said court held after such neglect of any clerk.

The secretary of state shall cause this chapter to be printed, with such forms and instructions as shall be prescribed by the attorney-general for the execution of the duties prescribed, and distribute them among the clerks mentioned, the expense of which shall be paid by the state treasurer. He shall also report in a tabulated form to each legislature the results of the information obtained in pursuance of this chapter.

CROP.

See LANDLORD AND TENANT.

DEADLY WEAPON.

WHAT IS A DEADLY WEAPON.—A deadly weapon is an instrument used, or that may be used, for the purpose of offence or defence, capable of producing death. Huntley, 91—617.

A deadly weapon is not one that *must* kill or that *may* kill, but it is one that would likely produce death or great bodily harm, used by the defendant in the manner in which it was used. Sinclair, 120—603.

A piece of pine weatherboarding fourteen to eighteen inches long, three-quarters of an inch thick, six inches wide at one end and tapering to a point at the other, was not a deadly weapon in the hands of a feeble fifteen-year-old boy weighing only eighty pounds, who held it by the small end and struck with its edge the leg and back of a grown man of average size who was being held by two other men. Sinclair, 120—603.

The question whether an instrument with which a personal injury has been inflicted is a deadly weapon often depends more on the manner of its use than upon the intrinsic character of the instrument itself. Norwood, 115—789.

Whether an instrument used in an assault is a deadly weapon is a ques-

tion of law where there is no dispute about the facts, and as the jurisdiction of the court depends upon the determination of the question, it is proper for the judge to determine such matter when necessary. Sinclair, 120—603.

In determining whether a weapon used in an assault is a deadly weapon, it is necessary to take into consideration the size and nature of the weapon, the manner in which it is used, the size and strength of the assailant and the assailed. Sinclair, 120—603.

DEAF AND DUMB PERSON.

Where a deaf and dumb prisoner is arraigned in this state there is no need of an issue to inquire first whether he stands mute of malice or by visitation of God, since under our statute the plea of not guilty is entered for him. Harris, 53, (8 Jones), 136.

On the arraignment of one for murder, it was suggested that the accused was a deaf mute and incapable of understanding the nature of a trial and its incidents and his rights under it: *Held*, proper for the court to have a jury empannelled to try the truth of these suggestions, and upon a finding in the affirmative, for the court to decline putting the prisoner on his trial. Harris, 53 (8 Jones), 136.

DEFINITION OF CRIMINAL ACTION.

Sec. 118 (129). Criminal action. C. C. P., s. 5.

A criminal action is:

- (1) An action prosecuted by the state, as a party against a person charged with a public offence, for the punishment thereof.
- (2) An action prosecuted by the state at the instance of an individual, to prevent an apprehended crime against his person or property.

DEMURRER TO EVIDENCE.

See also EVIDENCE.

PRACTICE WHERE DEMURRER OVERRULED.—Where a demurrer to evidence is overruled the defendant should not introduce evidence; if he has evidence which he intends to introduce he should take advantage of the

failure of the state to make out a case by a prayer to instruct the jury. Adams, 115—775.

Where, at the conclusion of the prosecutor's case, the defendant demurs to the evidence, it is proper for the court, upon overruling the demurrer, to refuse permission to the defendant to offer any testimony, and to charge the jury upon the state of facts admitted by the demurrer. Graves, 119—822.

Where the whole evidence is sent up, and the attorney-general does not object, a demurrer to the evidence may be entered in the supreme court. Wilcox, 118—1131.

Where a defendant desires the benefit of a demurrer to the evidence, he should first introduce his testimony, and then ask an instruction that there is not sufficient evidence to go to the jury. Graves, 119—822.

Where the defendant introduces no evidence and does not except to evidence introduced by the state nor to any ruling of the court, it is too late after verdict to move for a new trial on the ground that the testimony did not warrant the verdict. Leach, 119—828.

EFFECT OF DEMURRER SUSTAINED.—Where a demurrer to evidence is sustained on appeal, or an exception that there is no evidence to go to the jury, the case is not necessarily disposed of, because the state may produce more evidence on the next trial. Adams, 115—775.

DENTISTRY.

Sec. 119. Dentists; failure to register. 1887, c. 178.

All persons now practicing [dentistry] who shall fail to register according to the provisions of this act (laws 1887, c. 178), within the time prescribed, and who shall offer to practice dentistry, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars nor less than twenty-five dollars for each offence. Any person who shall knowingly and falsely claim or pretend to have or hold a certificate of proficiency granted by said board of examiners shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars nor less than twenty-five dollars for each offence. All fines and penalties so recovered shall be appropriated to the school fund of the county in which the same shall have been recovered. Nothing in this act shall be so construed as to prohibit any one from extracting teeth.

NOTE.—See laws 1887, chap. 178, regulating the practice of dentistry.

Sec. 120 (3154). Misdemeanor to practice dentistry without obtaining certificate, etc.; provisos. 1879, c. 139, s. 7.

Any person who shall practice dentistry in this state without having first passed the examination and obtained the certificate

hereinbefore provided, shall be guilty of a misdemeanor, and fined twenty-five dollars: *Provided*, any person so convicted shall not be entitled to sue for, or recover any fee or charge for dental service in any court, and any sum of money paid to a person so convicted for dental services rendered, may be recovered by the person so paying the same, or his legal representative: *Provided further*, no one applying for a license to practice dentistry shall be denied such license on account of race, color or previous condition of servitude.

DETECTIVES.

Sec. 121. Unlawful for detectives in bodies of more than three to go armed. 1893, c. 191.

SECTION 1. No body of men composed of more than three persons calling themselves detectives or claiming to be in the employ of any detective agency or known and designated as detectives shall go armed in this state.

SEC. 2. Any person or persons offending against this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court.

DISORDERLY HOUSE.

See BAWDY AND DISORDERLY HOUSES.

DISPOSING OF MORTGAGED PROPERTY.

See MORTGAGES.

DISTURBING CHURCH.

See RELIGIOUS CONGREGATION.

DISTURBING SCHOOL.

See SCHOOLS—and also DISTURBING PUBLIC ASSEMBLIES.

DISTURBING PUBLIC ASSEMBLIES.

Unlawful to disturb picnic, etc. 1897, c. 213.

SEC. 122. Any and all persons who shall, when intoxicated or otherwise, wilfully interrupt or disturb any picnic, excursion party, school entertainments, political meeting, or any meeting or other organization whatsoever lawfully and peaceably held, either at, within or without the place where such picnic, excursion party, school entertainments, political meetings, or any meeting or other organization is held, shall be guilty of a misdemeanor, and fined or imprisoned in the discretion of the court.

DOGS.

Sec. 123 (2499). Penalty and liability for damages in not killing a dog bitten by a mad dog. R. C., c. 67.

Whenever the owner of any dog shall know, or have good reason to believe, that his dog, or any dog belonging to any person under his control, has been bitten by a mad dog and shall neglect or refuse immediately to kill the same, he shall forfeit and pay the sum of fifty dollars to him who will sue therefor; and the offender shall be liable to pay all damages which may be sustained by any one, in his property or person, by the bite of any dog belonging as aforesaid, and shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days.

Sec. 124 (2500). Penalty for keeping a sheep-killing dog; misdemeanor. 1862-'63, c. 41, s. 1. 1874-'5, c. 108, s. 2.

Any person owning or having any dog or dogs that kill sheep, upon satisfactory evidence of the same being made before any justice of the peace of the county, and the owner duly notified thereof, if the owner of said dog or dogs refuses to kill it or them, or refuses to have the same done after such evidence has been

made, and shall permit said dog or dogs to go at liberty, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days, and the said dog or dogs may be killed by any one if found going at large.

Sec. 125 (2502). Dogs listed for taxation the subjects of larceny; tax. 1881, c. 302.

Dogs listed for taxation annually, at the usual time of listing taxes, shall be the subjects of larceny; and the tax on each dog so listed shall be one dollar annually, said tax to be applied to the common school fund.

DRAINING LOWLANDS.

Sec. 126 (1299). The commissioners shall report to court on payment of damages and costs; easement to vest in fee; no canal, ditch or dam made through yard, etc., or to injure mill, or to create nuisance by stagnant water, etc. R. C., c. 40, s. 3. 1795, c. 436, s. 2. 1835, c. 7. 1852, c. 57, ss. 1, 2. 1891, c. 434.

The commissioners shall report in writing, under their hands, the whole matter to the court, which shall confirm the same, unless good cause be shown to the contrary; and on payment of the damages and costs of the proceedings, the court shall order and decree that the petitioner may cut the canal or ditch, or raise the embankment in the manner reported and determined by the commissioners; and thereupon the petitioner shall be seized in fee-simple of the easement aforesaid: *Provided*, that, without the consent of the proprietor, such canal, ditch or embankment shall not be cut or raised through or on his yard or curtilage, nor be allowed when the same shall injure any mill, by cutting off or stopping the water flowing thereto; nor shall said dam be allowed so as to create a nuisance by stagnant water, or cut off the flow of useful springs or necessary streams of water, or stop any ditches of such proprietor when there is no feshet: *Provided*, that any ditch or canal having been cut through lands of any person by consent of owner of said land, it shall not be lawful for said owner or any other person to stop or in any way obstruct the passage of the water of said ditch or canal until after giving the interested parties reasonable time to comply with the mode of proceedings provided for the drainage of lowlands, and any person violating this section shall be subject to all damages incurred and guilty of a misdemeanor,

and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

NOTE.—The above section is to be found in The Code, chapter 30, entitled "Draining Lowlands," and refers to the report of the commissioners appointed by court to assess the damages caused by cutting canals or ditches through the lands of others.

DRUGGISTS.

Sec. 127. Druggists not to sell liquors except for bona fide medical purposes, and on prescription of physician. 1887, c. 215.

No druggist shall sell or otherwise dispose of any spirituous, vinous or malt liquors except for *bona fide* medical purposes and upon the prescription of a practicing physician known to such druggist to be of reputable standing in his profession or recommended as such by a physician who is so known, which prescription shall be in writing signed by such physician, and shall specify the name of the person to be supplied and quantity of dose, and no physician shall give a prescription to any drug store in which he is financially interested. Any druggist who shall violate the provisions of this section, and any physician or other person who shall give, procure or aid in procuring any false or fraudulent prescription for any spirituous, vinous or malt liquors in violation of the provisions of this act shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned at the discretion of the court.

INDICTMENT.—An indictment against a physician must aver not only that the prescription was false and fraudulent, but must state in what particular such falsity and fraud consisted. Farmer, 104—887.

It is not necessary that the indictment should charge that the physician giving the false prescription was a "reputable" physician, nor is it necessary to name the druggist to whom the prescription was given. Farmer, 104—887.

DRUMMERS.

See also LICENSE TAX.

ACT VOID AS TO NON-RESIDENT DRUMMERS.—Laws 1887, c. 135, section 25, making it indictable for a drummer to sell goods in this state without a license, is unconstitutional and void, as far as it applies to non-resident drummers. Bracco, 103—349.

WHO IS A DRUMMER.—A drummer, within the meaning of laws 1885, c. 175, section 28, is one who, for himself or as agent for a resident or non-resident or non-resident merchant, *travels and sells or offers to sell*, with or without sample, goods, wares or merchandise which are afterwards to be sent to the purchaser. Miller, 93—511.

VARIANCE.—Where the indictment charges the sale to have been to two as partners, and the proof shows a sale to one only, the variance is fatal. Miller, 93—511.

MUST BE IN ACTUAL POSSESSION OF LICENSE.—A drummer in order to protect himself from the penalty must be in the *actual* possession of his license at the time he makes the sale. Smith, 93—516.

TAX NOT UNCONSTITUTIONAL.—The drummer's license tax imposed by laws N. C., 1885, c. 175, section 28, is not in conflict with the constitution of the United States. Long, 95—582.

The rebate allowed merchants paying a purchase tax by section 25 of the said act does not discriminate against non-residents, since all persons, irrespective of residence, engaged in the business therein designated are entitled to its benefits. Long, 95—582.

DRUNKENNESS.

Voluntary drunkenness will not excuse crime committed by a man otherwise sane. Wilson, 104—868. Keath, 83—626. Potts, 100—457. John, 8 Ire., 330.

Delirium tremens is recognized as a species of insanity; but "dipsomania" and "moral insanity" are not recognized as defences. Potts, 100—457.

Delirium tremens being but a temporary madness, generally of short duration, he who sets it up as a defence must show that at the time the act was done he was in a paroxysm of that disorder. There is no presumption of its existence from antecedent fits which had been cured. Sewell, 48 (3 Jones). 245.

DUELING.

Sec. 128 (1012). Dueling, sending, accepting or bearing a challenge, a misdemeanor. R. C., c. 34, s. 48. 1802, c. 608, s. 1.

If any person shall send, accept or bear a challenge to fight a duel, though no death ensue, he, and all such as counsel, aid and abet him, shall be guilty of a misdemeanor, and moreover, be ineligible to any office of trust, honor or profit in the state, any pardon or relieve notwithstanding.

INDICTMENT—COPY OF CHALLENGE.—An indictment for sending a challenge need not set out a copy of the challenge. Farrier, 8 (1 Hawks), 487.

CHALLENGE TO FIGHT OUTSIDE THE STATE.—A challenge to fight a duel *out* of the state is indictable, since its tendency is to rouse the passions and produce an immediate breach of the peace. Farrier, 8 (1 Hawks), 487.

Sec. 129 (1013). Dueling, when death ensues, murder. R. C., c. 34, s. 3. 1802, c. 608, s. 2.

If any person fight a duel in consequence of a challenge sent or received, and either of the parties shall be killed, then the survivor, on conviction thereof, shall suffer death; and all their aiders or abettors shall be considered accessories before the fact.

DUPLICITY.

See INDICTMENT.

DYNAMITE AND OTHER EXPLOSIVES.

Sec. 130. License to sell explosives must be obtained. 1887, c. 364.

(1) It shall be unlawful for any dealer or other person to sell, or keep for sale any dynamite cartridges, bombs, or other combustibles of a like kind, without having first obtained from the board of commissioners of the county where such person or dealer resides a license for that purpose, for which he shall pay to the register of deeds for issuing the same a fee of twenty-five cents.

(2) It shall be the duty of every dealer in dynamite cartridges, bombs or other combustibles of a like nature, to keep a record of all sales of such articles, showing the party to whom the sale was made, the purpose for which it is to be used, the date of the sale and the amount sold, which said record of sales shall be at all times during the day open to the inspection of any and all persons who may desire to examine the same.

(3) It shall be unlawful for any person to fire off, explode or cause to be fired off or exploded, except for mechanical purposes in a legitimate business, any dynamite cartridge, bomb, or other explosive of a like nature, and any person so doing shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court.

(4) If any person shall violate the first or second section of this act he shall be guilty of a misdemeanor.

Sec. 131 (3405). Misdemeanor to use dynamite cartridge. 1879, c. 259, s. 1.

Any person using the dynamite cartridge, or any other explosive agent that destroys both old and young fish alike, shall be guilty of a misdemeanor and fined not less than five dollars nor more than twenty-five dollars for every time such explosive agent is used.

EATING-HOUSE.

The lessee of a stall in a market-house who furnishes meats to the public does not keep an "eating-house" within the meaning of the revenue act requiring such persons to pay a license-tax. Hall, 73—252.

ELECTION.

Where there are two counts and evidence of two corresponding offences proved, the court will not order the solicitor to select one of the offences and abandon the other. March, 46 (1 Jones), 526.

Separate indictments, and at different terms, may be treated as different counts in the same bill, if germane. Robbins, 123—730.

Where different felonies of the same nature are embraced in different counts in the same bill, the judge, in his discretion, may either quash the bill or compel the solicitor to elect. McNeill, 93—552.

Where there are several counts, each covering separate transactions punishable in the same way, or only one count, but testimony as to two or more transactions falling under the charge, the judge may, in his discretion, refuse or allow a motion to force the prosecutor to elect, and may determine the time when the election is to be made, if at all. Parish, 104—679.

In the exercise of this discretionary power the courts have generally held that the prosecutor, especially on the trial of felonies or offences punishable with infamous punishment, should be compelled to elect at the close of the testimony for the state, except in cases where the evidence of each one of the transactions is so mixed with and dependent on the testimony as to the others, with their attendant circumstances, that the court does not deem it practicable to confine the prosecutor to one transaction without destroying what seems to be a *prima facie* case of guilt against the defendant. Parish, 104—679.

It has never been deemed so important to enforce an election on the part of the prosecuting officer on the trial of misdemeanors punishable at the discretion of the court. Parish, 104—679.

Where there are several counts in an indictment drawn merely to meet the different phases of facts that will probably be proven, the judge will neither quash nor require an election. Parish, 104—679.

It is in the discretion of the court to quash an indictment or compel the prosecutor to elect on which count he will proceed when the counts charge offences *actually distinct and separate*. This discretion is generally exercised lest the defendant should be confounded in his defence, or be prejudiced in his challenges to the jury, for he might object to a juryman trying one of the offences, when he would have no objection to his trying the other. Haney, 19 (2 D. & B.), 390.

Where an indictment for the larceny of some wheat contains two counts, one for the larceny and the other for receiving the *same wheat*, knowing it to have been stolen, an exception to the refusal of the court to require an election can not be sustained. Morrison, 85—561.

An indictment which contains several counts charging different felonies of the same grade and subject to the same punishment, may be quashed on motion made in apt time, or the solicitor may be required to elect on which count he will proceed. But in such case it is not error to refuse a motion to arrest the judgment after conviction; so where an indictment for larceny contained two counts, one charging the larceny of an ox and the other the larceny of one pound of beef, and there was a general verdict of guilty, a motion in arrest of judgment was properly overruled. Reel, 80—442.

A motion to quash on the ground that a bill for the same offence had been found at a former term, and having become mutilated, a second bill had been prepared and conveyed to the door of the grand jury room and handed to the foreman by an attorney employed to aid in the prosecution, and returned a true bill, and that, upon objection for this irregularity, a third bill was sent upon which the solicitor now proposed to try, is properly denied. The solicitor is not restricted to the first bill found, but may send another and require the accused to answer that at the election of the state. Hastings, 86—596.

The solicitor may send another bill at any time before entering on the trial. Dixon, 78—558.

Where there are two indictments relating to the same transaction, they may be treated as one bill with two counts, and may be joined wherever a joinder of counts would be authorized. If the counts are inconsistent, it is ground for motion to quash, or the state may be required to elect upon which the trial shall be had. Watts, 82—656. Johnson, 50 (5 Jones), 221.

Distinct felonies of the same nature may be charged in different counts, or two indictments for the same offence may be treated as one containing different counts, subject to the right of the defendant to move to quash in case of inconsistent counts and the power of the court to require an election as to which count or indictment the state will insist. McNeill, 93—552.

While the rule is that where the state charges one offence and proves other offences of the same kind, the defendant may require an election at the close of the state's evidence as to which it will rely upon, yet where the same offence is proved at different intervals by different witnesses, he is not entitled to demand an election. Boggan, 120—590.

It is competent for the state to prove any number of offences of the kind charged in the indictment, in which case the defendant's remedy is, at the close of the evidence, to ask the court to require the solicitor to elect on which offence he relies, and where no such request is made and refused, the conviction will not be disturbed. Williams, 117—753.

ELECTIONS.

See ILLEGAL VOTING—REGISTRATION OF VOTERS.

EMBEZZLEMENT.

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| SEC. 132. Embezzlement punished as larceny. | SEC. 136. By officer of railroad company. |
| SEC. 133. Embezzlement of state bonds. | SEC. 137. Conspiracy with officer of railroad. |
| SEC. 134. Embezzlement of trust funds. | SEC. 138. Sufficiency of indictment. |
| SEC. 135. Embezzlement by treasurer of benevolent association or religious institution. | SEC. 139. Embezzlement by officer of taxes. |
| | SEC. 140. Fines and penalties. |

Sec. 132 (1014). Embezzlement punished as larceny. 1871-'2, c. 145, s. 2. 21 Hen. VII., c. 7. 39 Geo. III., c. 85. 7 and 8 Geo. IV., c. 39, s. 47. 24 and 25 Vlot., c. 96, s. 68. 1889, c. 226. 1891, c. 188. 1897, s. 31.

If any officer, public officer, clerk of the superior or other court, sheriff or other person or officer exercising a public trust or holding public office, agent, consignee, clerk, employee or servant of any corporation, person or copartnership, guardians, administrators and executors, (except apprentices and other persons under the age of sixteen years), shall embezzle or fraudulently convert to his own use, or shall take, make way with or secrete, with intent to embezzle or fraudulently or knowingly and wilfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, which shall have come into his possession or under his care, he shall be guilty of felony, and punished as in cases of larceny.

INDICTMENT.—The indictment must allege that defendant is not an apprentice nor within the age of sixteen years. Lanier, 88—658.

The omission of the words "with force and arms," is immaterial. Harris, 106—682.

Where an indictment charges several distinct offences in different counts, whether felonies or misdemeanors, the state may be required to elect. Harris, 106—682.

INDICTMENT—MISJOINDER.—Where two persons are charged with embezzlement in one count, and in another count one of them is charged with

the same offence, this is not a misjoinder, since the latter count, being embraced in the first, is mere surplusage. Harris, 106—682.

CHARGING BOTH EMBEZZLEMENT AND LARCENY.—Where a count for embezzlement contains also a charge of larceny, the charge of embezzlement will be upheld as good and that of larceny treated as surplusage. Harris, 106—682.

NOT NECESSARY TO SHOW THAT PROPERTY WAS COMMITTED TO DEFENDANT'S CUSTODY.—It is not necessary to aver or prove that the property alleged to have been embezzled had been committed to the custody of defendant, nor any breach of trust or confidence except that which grows out of the relation between the owner and servant or agent. Wilson, 101—730.

AVERMENT THAT DEFENDANT WAS OVER SIXTEEN.—An averment that defendant was not "within the age of eighteen years" is a sufficient negative that he was under sixteen. Wilson, 101—730.

PUBLIC OFFICERS.—This section does not extend to public officers, such as clerks of the superior court and sheriffs. Connelly, 104—794.

(This decision was made before the amendment of 1891, which inserted the words "public officer, clerk of the superior court," etc.)

MEANING OF EMBEZZLEMENT.—To "embezzle" means not only to "appropriate to one's own use," but also to "misappropriate fraudulently." Foust, 114—842.

NOT NECESSARY TO APPROPRIATE TO OWN USE.—Where the indictment charged that defendant "did convert to his own use and embezzle" a check, an instruction that he was guilty if he received the check and misappropriated it fraudulently, whether for his own benefit or not, was proper. Foust, 114—842.

Sec. 133 (1015). Embezzlement of state bonds or other property of the state, by state officers or employees. 1874-'5, c. 52.

If any officer, agent or employee of the state, or other person having or holding in trust for the same any bonds issued by said state, or any security, or other property and effects of the same, shall embezzle or knowingly and wilfully misapply or convert the same to his own use, or otherwise wilfully or corruptly abuse the said trust, such offender and all persons aiding and abetting, or otherwise assisting therein, shall be guilty of felony, and fined not less than ten thousand dollars, or imprisoned in the penitentiary not less than twenty years, or both, at the discretion of the court.

Sec. 134 (1016). Embezzlement of trust funds by public officers, felony. 1876-'7, c. 47. 1891, c. 241.

If any officer, agent, or employee of any city, county, or incorporated town, or of any penal, charitable, religious or educational institution; or if any person having or holding any moneys or property in trust for any city, county, incorporated town, penal, charitable, religious or educational institution, shall embezzle or otherwise wilfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held,

such person shall be guilty of felony, and fined and imprisoned in the discretion of the court. If any clerk of the superior, inferior or criminal courts of the state, any sheriff, treasurer, register of deeds or other public officer of any county or town of the state shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper person entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony. That the provisions of this act shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their successor in office or other persons lawfully entitled to receive the same all such moneys, funds and securities or property aforesaid. The punishment shall be imprisonment in the penitentiary or county jail or fine, in the discretion of the court.

In all indictments under this act the provisions of section one thousand and twenty of The Code shall apply.

This section does not embrace the unlawful appropriation of the property of private individuals, but is limited to the embezzlement of property held in trust for any city, county, etc. Connelly, 104—794.

Sec. 135 (1017). Embezzlement by treasurer of benevolent or religious institution, a misdemeanor. 1879, c. 105.

If any treasurer or other financial officer of any benevolent or religious institution, society or congregation shall lend any of the moneys coming into his hands to any other person or association without the consent of the institution, association or congregation to whom such moneys belong; or, if he shall fail to account for such moneys when called on, he shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, in the discretion of the court.

Sec. 136 (1018). Embezzlement by officer of railroad company, felony 1870-'1, c. 103. s. 1.

If any president, secretary, treasurer, director, engineer, agent, or other officer of any railroad company, shall embezzle any moneys, bonds, or other valuable funds, or securities, with which such president, secretary, treasurer, director, engineer, agent, or other officer, shall be charged by virtue of his office, or agency, or shall in any way, directly or indirectly, apply or appropriate the same, for the use or benefit of himself, or any other person, state, or corporation, other than the company of which he is president,

secretary, treasurer, director, engineer, agent or other officer, for every such offence the person so offending shall be guilty of felony, and on conviction in the superior or criminal court of any county through which the railroad of such company shall pass, shall be imprisoned in the penitentiary not less than three, nor more than ten years, and fined not less than one thousand, nor more than ten thousand dollars.

Sec. 137 (1019). Embezzlement, conspiracy with officer of railroad. 1870-'1, c. 103, s. 2.

If any person shall agree, combine, collude, or conspire with the president, secretary, treasurer, director, engineer or agent of any railroad company, to commit any offence specified in the preceding section, such person so offending shall be guilty of felony, and on conviction in the superior or criminal court of a county through which the railroad of any company against which such offence may be perpetrated passes, shall be imprisoned in the penitentiary for not less than three, nor more than ten years, and fined not less than one thousand, nor more than ten thousand dollars.

Sec. 138 (1022). Embezzlement, sufficiency of indictment for. 1871-'2, c. 145, s. 2.

In indictments for embezzlement, except when the offence shall relate to a chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved.

Sec. 139 (3705) Embezzlement by officer of taxes, etc. 1883, c. 136, s. 49.

Any officer appropriating to his own use the state, county, school, city or town taxes, shall be guilty of embezzlement, and may be punished not exceeding five years in the state prison at the discretion of the court.

Sec. 140 (3678). Fines and penalties to be paid by collecting officers to the board of education; embezzlement by officer. 1872-'3. c. 144, sub chap. 6, ss. 6, 7. 1883, c. 136, s. 48.

Whenever any officer receives or collects a fine, penalty or forfeiture in behalf of the state, or any tax imposed on licenses to retailers of wines, cordials, malt or spirituous liquors, and auctioneers, he shall, within thirty days after such reception or col-

lection, pay over and account for the same to the treasurer of the county board of education for the benefit of the fund for common schools in such county. Any officer convicted of violating this section shall be guilty of embezzlement, and may be punished not exceeding five years in the penitentiary, and fined at the discretion of the court.

INDICTMENT.—An indictment under this section charging embezzlement in “wilfully, knowingly and corruptly” failing to pay over a fine to the school fund, is sufficient without using the word “feloniously.” Hill, 91—561.

EMBRACERY.

The indictment charged that defendant, who was counsel for certain defendants on trial for larceny, after the jury had retired, approached the officer in charge of the jury and inquired as to their opinion, saying that “he had come to give them instructions,” and asked the officer if any instructions were needed to let him know, and he would give them: *Held*, that the indictment was fatally defective for failure to charge *an attempt to carry into effect* the corrupt purpose. Brown, 95—685.

Embracery consists in such practices as tend to unduly influence the administration of justice by improperly working upon the minds of the jurors. To constitute the offence there must be an *attempt* to carry into effect the corrupt purpose—to form the purpose and give it expression merely in words is not sufficient. Brown, 95—685.

ENTERING ANOTHER'S LANDS.

Sec. 141. Misdemeanor to wrongfully take possession of lands. 1893, c. 347.

SECTION 1. If any person shall enter upon the lands of another and take possession of any house or building being thereof, without permission of the owner or agent and without a *bona fide* claim of right or title so to enter and take possession, such person shall be guilty of a misdemeanor and fined or imprisoned at the discretion of the court if he fails or refuses to vacate said premises within ten days after being notified personally in writing to quit said premises.

SEC. 2. All persons who may have heretofore entered on the land of another and taken possession of any house thereon without leave of the owner or his agent and without a *bona fide* claim of title, shall vacate such house and premises within ten days after the

service on such person of a written notice by the owner or agent of such owner to vacate said house and premises, that any such person violating this section shall be guilty of a misdemeanor.

ESCAPE.

Sec. 142 (1021). Escape, prison-breach by criminal. R. C., c. 34, s. 19. 1 Edw. II., St 2d.

Any person who shall break prison, being lawfully confined therein, shall be guilty of a misdemeanor.

CONVICT GUARD.—A person employed as a guard over convicts is criminally responsible for the escape of the prisoners confided to his care, and when such guard sends a convict, a "trusty," several hundred yards away, without guard, after articles needed in their work, and the prisoner makes his escape, the guard is guilty. Johnson, 94—924.

APPEAL NOT DISMISSED ON ESCAPE.—Where the prisoner escapes after appealing to the supreme court, the appeal will not be dismissed, but the case will be allowed to remain on the docket until the prisoner is rearrested, when it will be called at the instance of the attorney-general, or of the prisoner. McMillan, 94—945.

ESCAPE A MISDEMEANOR.—An escape from arrest upon a charge for a misdemeanor, and without force, is itself a misdemeanor. Brown, 82—585.

Sec. 143 (1022). Escape, officer indictable for, what necessary for state to prove. R. C., c. 34, s. 35. 1791, c. 343, s. 1.

When any person charged with a crime or misdemeanor, or sentenced by the court upon conviction of any offence, shall be legally committed to any sheriff, constable or jailer, or shall be arrested by any sheriff, deputy-sheriff or coroner acting as sheriff, by virtue of any *capias* issued on a bill of indictment, information, or other criminal proceeding, and such sheriff, deputy-sheriff, coroner, constable or jailer, wilfully or negligently, shall suffer such person, so charged, or sentenced and committed, to escape out of his custody, the sheriff, deputy-sheriff, coroner, constable or jailer so offending, being thereof convicted, shall be removed from office, and fined at the discretion of the court before whom the trial may be had; and in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that such person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence: *Provided*, that such removal of a sheriff shall not affect his duty

or power as a collector of the public revenue, but he shall proceed on such duty and be accountable, as if such conviction and removal had not been had.

INDICTMENT.—An indictment charging that defendant “negligently” permitted the escape is sufficient without using the word “wilfully.” The use of the disjunctive “or” shows that the mischief intended to be suppressed is two-fold: one where the escape is the result of *negligence*, and the other where it is the *wilful* act of the officer in promoting the escape. McLain, 104—894.

An indictment for assisting prisoners to break jail, which does not allege that such prisoners had committed any offence, or state facts or circumstances from which the court can see that they were lawfully in prison, is fatally defective. Jones, 78—420.

VARIANCE.—Where the charge is that defendant escaped from arrest made under an indictment against him and another for an affray, and the proof is that the indictment was for assault and battery, the variance is immaterial, since the gravamen of the charge is the *escape from custody*, and, besides, one may be convicted of assault and battery under a bill charging an affray. Brown, 82—585.

EVIDENCE—BURDEN ON DEFENDANT TO SHOW WANT OF NEGLIGENCE.—Where the escape is proven or admitted, the burden is shifted to defendant to show that there was no negligence on his part, and that he used all legal means for the safe keeping of the prisoner. Hunter, 94—829.

FAILURE TO HANDCUFF PRISONER.—The failure to handcuff the prisoner is not *per se* negligence, but jury must decide whether the failure to do so contributed to the escape, and whether defendant had used due diligence in attempting to guard the prisoner without them. Hunter, 94—829.

ESCAPE FROM ARREST ON BASTARDY WARRANT.—An indictment lies at common law, independent of the statute, against an officer who permits the escape of one arrested on a bastardy warrant. Ritchie, 107—857.

ESCAPE PENDING APPEAL, CASE CONTINUED.—Where a defendant convicted of larceny escapes pending the appeal, the appeal will not be dismissed, but will be continued, to be called when defendant shall be retaken. Pickett, 94—971.

HEARING IN SUPREME COURT AFTER PRISONER'S ESCAPE.—Where a person who has been convicted of an offence appeals from the judgment and escapes, the supreme court may proceed with the hearing of the exceptions, dismiss the appeal, or direct the cause to be continued to await the recapture of the fugitive, and any judgment it may pronounce will not be invalid because of the fact that the defendant was not actually or constructively in custody, or not represented by counsel. Jacobs, 107—772.

Where a prisoner under sentence of death is rescued and escapes, and is not recaptured until after the day fixed for the execution, the judge, at a subsequent term, may direct the sentence to be carried into effect. Cardwell, 95—643.

RESPIRE BY GOVERNOR.—The fact that the prisoner had been granted a respite by the governor does not make it the duty of the executive to fix the day for the execution after the prisoner is recaptured. Cardwell, 95—643.

Where a prisoner convicted of a capital felony escapes and is at large when his appeal is called in the supreme court, the court will either hear and determine the assignments of error, dismiss the appeal, or continue the case. Cody, 119—908.

JAILER TRUSTING KEYS TO ASSISTANT.—On indictment of a jailer for the escape of a prisoner, it appeared that he had entrusted some of the keys

to an assistant, who, according to the testimony, connived at the escape: *Held*, that it was proper to instruct the jury that the only question was whether the defendant exercised due care in the employment of his assistant. *Lewis*, 113—622.

DEFENDANT MUST NEGATIVE NEGLIGENCE.—On indictment of a jailer for the escape of a prisoner in his custody, it is not necessary to prove negligence on his part, since that is implied, and the burden is on defendant in such case to show that the escape was not with his consent or through his negligence. *Lewis*, 113—622.

INDICTMENT MUST AVER ESCAPE OF LAWFUL PRISONERS.—An indictment for assisting prisoners to break jail which does not allege that such prisoners had committed any offence, or state facts or circumstances from which the court can see that they were lawfully in prison, is fatally defective. *Jones*, 78—420.

PAROL AUTHORITY TO COMMIT PRISONER VOID.—When a person, not a constable, has been deputed to serve a state's warrant, the deputation ceases upon his returning the defendant before a justice and returning the process before him. An authority to convey a prisoner to jail can not be given by a justice by parol; nor is a person thus conveying a prisoner liable to indictment for an escape. *Dean*, 48 (3 *Jones*), 393.

RESPONSIBILITY OF OFFICERS.—Officers and public agents will not be held to the rigorous common law rule of responsibility for the custody of convicts outside the penitentiary, *actual negligence* being the test of guilt. *Johnson*, 94—924.

As a general rule it is not necessary to prove negligence when one has the lawful custody of prisoners, for it is implied unless occasioned by the act of God, or from irresistible adverse force. *Johnson*, 94—924.

CONVICT USED AS "TRUSTY."—Where a prisoner confined in the public jail was used by the county authorities to work on the public roads, the person in charge of him was guilty of an escape for negligently allowing such person to make his escape. *Sneed*, 94—806.

EFFECT OF ESCAPE PERMITTED BY OFFICER AS TO FINE AND COSTS.—An escape permitted by the sheriff does not operate as a discharge of a fine and costs imposed on defendant, who was placed in the custody of the sheriff. *Simpson*, 46 (1 *Jones*), 80.

JUSTIFICATION—ERRONEOUS JUDGMENT NO EXCUSE.—An officer charged with an escape can not justify on the ground that the prisoner was placed in his custody under an erroneous judgment. *Garrell*, 82—580.

Sec. 144 (1023). Escape, duty of solicitor in such a case. R. C., c. 34, s. 36. 1791, c. 343, s. 2

It is hereby declared to be the duty of solicitors, when they shall be informed or have knowledge of any felon, or person otherwise charged with any crime or offence against the state, having within their respective districts escaped out of the custody of any sheriff, deputy-sheriff, coroner, constable or jailer, to take the necessary measures to prosecute such sheriff, or other officer so offending.

ESTOPPEL.

The doctrine of estoppel does not apply to the state. Williams, 94—891.

EVIDENCE.

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| 1. Age of person. | 19. Examination of paper. |
| 2. Alibi. | 20. Experts. |
| 3. Character. | 21. Identity of accused. |
| 4. Character of defendant. | 22. Insufficient evidence. |
| 5. Circumstantial evidence. | 23. Judgments of courts of other states. |
| 6. Co-defendants. | 24. Laws of other states and countries. |
| 7. Collateral matters. | 25. Mental or bodily feelings. |
| 8. Collateral offence. | 26. Notice to produce papers. |
| 9. Competency of witness. | 27. Parol evidence. |
| 10. Competent evidence excluded. | 28. <i>Prima facie</i> evidence. |
| 11. Confessions. | 29. Records. |
| 12. Corroboration. | 30. Relations. |
| 13. Declarations of others. | 31. <i>Res gestae</i> . |
| 14. Defendant's declarations. | 32. Written examination. |
| 15. Defendant's acts. | 33. Miscellaneous matters. |
| 16. Depositions. | |
| 17. Discrediting own witness. | |
| 18. Dying declarations. | |

1. AGE OF PERSON.

The age of a child may be shown by entries in a Bible where the witness states that he knew the handwriting of the child's mother, that the Bible belonged to the mother, and that the entries had been made by her and that she had been dead seven years. Hairston, 121—579.

A witness may testify to his own age according to the reputation in the family. Best, 108—747.

2. ALIBI.

Evidence that a servant of defendant, on the morning after the offence was committed, went to a neighbor's house to borrow a pair of saddlebags and returned with them toward home is competent, if it be further proved that the defendant was seen soon afterwards with a pair of saddlebags going in a direction from home. Scott, 22 (2 D. & B.), 35.

What defendant said to a witness who saw him at a distant place at a particular time can not be given in evidence by defendant to prove an alibi. Morgan, 19 (2 D. & B.), 348.

An instruction that it is "essential to the successful proof of an alibi that it should cover the whole time of the occurrence" is erroneous, since the effect of the evidence is for the jury, whether it cover all or only part of the time. Jaynes, 78—504.

A charge that when an alibi is set up, the burden is shifted to defendant to establish it, can not be sanctioned, yet if such an instruction is fol-

lowed by another, that the state must prove beyond a reasonable doubt both the perpetration of the crime and that defendant committed it, and that if such absence was shown it was an end to the case, the objection is removed. Freeman, 100—429.

A charge "that the burden of proof to show the guilt of the prisoner was upon the state, but when the state had made out a *prima facie* case, and the prisoner attempted to set up an *alibi*, the burden of proof was shifted, and that if the defence failed to establish the *alibi* to the satisfaction of the jury, they must find the prisoner guilty," is erroneous. Josey, 67—56.

3. CHARACTER.

While a witness as to character may, of his own motion, say in what respect the character of the person asked about is good or bad, the party introducing him can only interrogate him as to the general character of such person. Hairston, 121—579.

Where a character witness answers that he does not know the character of the party introducing him, he should be stood aside; the party introducing him has no right afterwards to ask him if he knows his character for truth and honesty. Wheeler, 104—893.

A witness introduced to impeach another witness can not be asked if, from his general character, he would believe the impeached witness on oath. Caveness, 78—484.

Where a witness, called to impeach the character of another witness, states that he knew his character when he lived in another place some two or three years ago, but does not know what his character is where he now lives, such evidence is not too remote, and its rejection is error. Lanier, 79—622.

A witness who gives another witness a bad character may be asked, on cross-examination to name the persons who had spoken disparagingly of the witness, and what was said. Perkins, 66—126.

A witness will not be allowed to testify as to character until he shall have first qualified himself by stating that he knows the general reputation of the person in question. Coley, 114—879.

Where the prosecuting witness testifies that the defendant told him that he sold the cotton taken from the barn of W, who was neither a party nor a witness, it was not error to refuse to allow defendant to prove that W was a man of good character. Staton, 114—813.

If a character witness is cross-examined as to particular facts the redirect examination must be confined to the particular matter brought out by the cross-examination. Ussery, 118—1177.

4. CHARACTER OF DEFENDANT.

Where defendant offered proof only of the character he sustained at the time of the alleged offence it is not competent to prove his character at the time of the trial. Johnson, (60 Winst.), 151.

Where a defendant introduces evidence of his good character, the state is limited in reply to evidence of general reputation. Laxton, 76—216.

Where on the trial the defendant testifies in his own behalf and introduces no evidence as to his general character, but the state introduces evidence to show that his character is bad, such evidence by the state can only be considered as affecting the credibility of the defendant as a witness, and not as a circumstance in determining the question of his guilt or innocence. Traylor, 121—674.

Where there is no evidence of the character of the defendant the jury

are to weigh the testimony as if they knew nothing against him except what was disclosed on the trial. Collins, 14 (3 Dev.), 118.

A defendant may offer evidence of his good character without testifying in the case himself. Hice, 117—782.

Where a defendant offers evidence of his good character the state may show his bad character either by cross-examination or by other witnesses. Hice, 117—782.

When a prosecutor or defendant goes *upon the witness stand as a witness* he becomes just as any other witness, and his general character can be proven, not only as it was before a charge affecting it was made, but as it is at the date he goes upon the stand. Spurling, 118—1250.

5. CIRCUMSTANTIAL EVIDENCE.

Evidence of facts, which in themselves are slight, should in cases of circumstantial testimony, be admitted if they, with other facts proved, bear upon the crime charged. Rhodes, 111—647.

Where the evidence is circumstantial, each fact proving a necessary link in the chain must point to the guilt of the accused, and must be as clearly and distinctly proven as if the whole case depended on it, the strength of the chain being determined by the strength of its weakest link. Carson, 115—743.

It is not error to refuse an instruction that the strength of circumstantial evidence must be equal to the strength of the testimony of one credible eye-witness. Carson, 115—743.

Circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but it is essential, and, when properly understood and applied, highly satisfactory in matters of the gravest moment. Brackville, 106—701.

In cases of circumstantial evidence the facts, their relations, connections and combinations should be natural, reasonable, clear and satisfactory; and such evidence, when relied upon to convict, should be clear, convincing and conclusive in its connections and combinations, excluding all rational doubt as to defendant's guilt. Brackville, 106—701.

MOTIVE.—It is never necessary to show a motive for the commission of a crime, but where the prosecution relies upon circumstantial evidence it is competent to introduce evidence tending to prove a motive. Green, 92—779.

6. CO-DEFENDANTS.

DEFENDANT A WITNESS AGAINST HIS CO-DEFENDANT.—A defendant, jointly indicted with another, is competent and compellable to testify against his co-defendant. Smith, 86—705.

The practice of sending co-defendants to the grand jury to testify against each other, while allowable, is not commended. They may be compelled to so testify unless their evidence tends to criminate themselves. Frizell, 111—722.

Declarations of one of two defendants jointly on trial are admissible only as against the party making them, and, if admitted, it is error not to instruct the jury that such declarations are incompetent as to the other defendant. Collins, 121—667.

Where defendants testify in their own behalf, it is error to instruct the jury that they have "the right to scrutinize closely the testimony of the defendants and receive it with grains of allowance on account of their interest in the event of the action," without adding that, if they believed the witnesses to be credible, then they should give to their tes-

timony the same weight as the evidence of other witnesses. *Holloway*, 117—730.

Where, on the trial of four defendants indicted for an affray, three of them testified, and the fourth, their antagonist, was called in his own behalf, the other defendants had the same right to impeach him on cross-examination as though he had been a witness instead of a co-defendant. *Goff*, 117—755.

7. COLLATERAL MATTERS.

ANSWERS AS TO COLLATERAL MATTER CONCLUSIVE. EXCEPTION.—The answer of a witness on cross-examination to collateral questions is conclusive, except "as to matters which, although collateral, tend to show the temper, disposition and conduct of the witness in relation to the cause or the parties." Following *State v. Patterson*, 2 Ired., 346. *Ballard*, 97—443.

Where a witness for the state is asked on cross-examination if the prosecutor has not paid him for coming from a distant state to be a witness, and he answers that he has not, defendant may introduce witnesses to prove his declaration that he had been so paid. Collateral matters which tend to show the temper, disposition or conduct of the witness towards the cause or the parties are exceptions to the rule which treats answers to collateral matters as conclusive. *Patterson*, 24 (2 Ired.), 346.

It is not competent to ask and elicit an answer to a question collateral to the issue in order to prove it false and thus impugn the credit of the witness. *Glisson*, 93—506.

8. COLLATERAL OFFENCE.

It is only when the transactions are so connected or contemporaneous as to form a continuing action that evidence of a collateral offence will be heard to prove the intent of the offence charged; hence in the trial of an indictment for burning a dwelling-house occupied by the defendant as lessee, evidence that the defendant at a prior time was guilty of a similar offence, is inadmissible. *Graham*, 121—623.

On indictment for false pretences it is competent to prove other similar transactions by the defendant in order to show the *scienter*. *Walton*, 114—783.

It is only when the transactions are so connected or contemporaneous as to form a continuing action that evidence of a distinct substantive and collateral offence will be admitted to prove the intent with which the offence charged was committed. *Jeffries*, 117—727.

Other criminal acts may be proved if they are connected with the one charged. *Mace*, 118—1244.

On indictment for uttering counterfeit money evidence may be received of former acts and transactions which tend to bring home the *scienter* to the defendant, notwithstanding such evidence may fix upon other charges than that on which he is tried. *Twitty*, 9 (2 Hawks), 248.

The collateral offence to prove the intent must be confined to a time before, or just about the time, the offence charged against the defendant is alleged to have been committed. *Jeffries*, 117—727.

It is a rule of evidence, subject to few exceptions, that evidence of a distinct substantive offence can not be admitted in support of a charge of another offence; therefore, on a charge of larceny of money given to the prosecutrix by defendant it was error to admit evidence that defendant had seduced her under a promise of marriage, such evidence not showing that he had been compelled to give her the money on account of the seduction. Nor in such case was evidence admissible as to defendant's inability (he being a married man) to make good his promise of marriage. *Frazier*, 118—1257.

9. COMPETENCY OF WITNESS.

Sec. 145 (1192). Party whose name is forged a competent witness. R. C., c. 35, s. 22.

No person shall be deemed to be an incompetent witness by reason of any interest which such person may have, or be supposed to have, in respect to any deed, writing, instrument, or other matter whatsoever, in support of any prosecution, wherein shall be questioned the fact of forging such deed, writing, instrument, or other matter whatsoever, or the fact of uttering, showing forth in evidence, or disposing thereof, knowing the same to be forged.

Sec. 146 (1215). Persons participating in unlawful gaming compelled to testify of the gaming; not to be prosecuted therefor. R. C., c. 34, s. 50.

No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery, made by the witness upon such examination, shall be used against him, in any penal or criminal prosecution, and he shall be altogether pardoned of the offence so done, or participated in by him.

Sec. 147 (1350). No witness incapacitated by interest or crime. 1866, c. 43, ss. 1, 4. 1869-'70, c. 177. 1871-'2, c. 4.

No person offered as a witness shall be excluded by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury or other person having, by law, authority to hear, receive and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills.

Sec. 148 (1353). Defendants in criminal proceedings competent in their own behalf at their own request; husband or wife of defendant competent for defendant. 1881, c. 89, s. 3. 1881, c. 110, ss. 2, 3.

In the trial of all indictments, complaints or other proceedings against persons charged with the commission of crimes, offences and misdemeanors, the person so charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him. The

husband, or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant; but the failure of such witness to be examined shall not be used to the prejudice of the defence. But every such person examined as a witness shall be subject to be cross-examined as other witnesses.

HUSBAND COMPETENT WITNESS AGAINST WIFE, WHEN.—A husband is a competent witness against his wife on indictment against her for assault and battery in striking the husband with an axe, since the use of such a deadly weapon indicates malice. Davidson, 77—522.

The husband or wife of the defendant is a competent witness *for the defendant* in all criminal proceedings, but neither is competent or compellable to give evidence *against* the other. Harbison, 94—885.

AFTER DIVORCE.—A divorced husband is incompetent to testify against the divorced wife as to acts of adultery which occurred prior to the divorce. Raby, 121—682.

DEFENDANT VOLUNTARILY TESTIFYING.—Where a defendant is called by his counsel and sworn and examined as a witness he will be deemed to be exercising his right to testify under this section, and will be deemed to have waived the caution prescribed in section 1145 of The Code. Hawkins, 115—712.

Sec. 149 (1354). Incompetent evidence, what. 1856-'7, c. 23. 1866, c. 43, s. 3. 1858-'9, c. 209, s. 4.

Nothing in this chapter, except as provided in the preceding section, shall render any person, who in any criminal proceeding is charged with the commission of a criminal offence competent, or compellable, to give evidence against himself, nor shall render any person compellable to answer any question tending to criminate himself, nor shall in any criminal proceeding render any husband competent or compellable to give evidence against his wife, nor any wife competent or compellable to give evidence against her husband: *Provided*, that in all criminal prosecutions of a husband for an assault and battery on the person of his wife, or for abandoning his wife, or for neglecting to provide for her support, it shall be lawful to examine the wife in behalf of the state against the said husband.

DEFENDANT CRIMINATING HIMSELF.—Where a defendant offers himself as a witness in his own behalf he waives his constitutional privilege of refusing to answer self-criminating questions. Thomas, 98—599.

Where defendant testifies in his own behalf he waives his constitutional right not to answer questions which tend to criminate him. Allen, 107—805.

WIFE OF ONE DEFENDANT WHERE TWO ARE INDICTED.—On indictment against two persons for an affray, the wife of one of them is not a competent witness for the other defendant. Harbison, 94—885.

ATTORNEY AND CLIENT.—One charged with a crime, who turns state's witness against his associates, under an assurance that his disclosures are not to be used against him, may be cross-examined as to what he told his counsel about the offence while he was himself charged, since he testifies with the express understanding that he is to disclose his own

guilt, and the rule which excludes communications between attorney and client no longer applies. Condry, 50 (5 Jones), 418.

Sec. 150 (588). Husband and wife witnesses. C. C. P., s. 341. 1866, c. 40, s. 2.

In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law, or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, as any other witness, on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

MARRIAGE—INDIANS COHABITING.—Cohabitation between an Indian man and woman according to the ancient customs of their tribe, which leave the parties free to dissolve the connection at pleasure, is not marriage, and, therefore, the parties to such relation may be compelled to testify against each other. Ta-cha-na-tah, 64—614.

On indictment for fornication and adultery the husband of the *feme* defendant is a competent witness against her to prove her marriage to him. McDuffie, 107—885.

On indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage, public cohabitation as man and wife being public acknowledgments of the relation and not coming within the nature of the confidential relations which the policy of the law forbids either to give in evidence. Melton, 120—591.

10. COMPETENT EVIDENCE EXCLUDED.

Error in excluding testimony which is competent for the purpose of impeachment can be remedied only by a *venire de novo*, though the facts excluded may have been subsequently brought out by other witnesses. Distinguishing State v. Ballard, 97—443. Clark v. Clark, 65—655. Goff, 117—755.

While error in excluding competent testimony is cured by afterwards admitting it from the same witness, it is not cured by admitting another witness to testify to the same purport. Rollins, 113—722.

Error in the admission of incompetent testimony is cured by its subsequent withdrawal and a direction to the jury that they must neither consider it nor give it any weight in making up their verdict. Apple, 121—584.

11. CONFESSIONS.

What amounts to such threats or promises as render confessions inadmissible as being not voluntary; what evidence the judge will hear to establish the facts of threats or promises; and whether there be any evidence to show that the confessions are not voluntary are questions of law, and the decisions upon them are subject to review in the supreme court.

Whether the evidence, if true, proves the fact of threats or promises; whether the witnesses testifying to the court as to such facts are worthy of credit; and, in case of conflict, which of them is to be believed are questions of fact for the judge, and his decision upon them is not subject to review. Andrew, 61 (Phil. Law), 205.

The promise of a female witness to marry the prisoner on condition that he would confess his crime to her is not sufficient to exclude such confessions, since the promise is only of some collateral advantage entirely disconnected from the charge. Hardee, 83—619.

Declarations of a prisoner made to the officer after his arrest, but not in reply to any charge made against him, are inadmissible. Reitz, 83—634.

Where a slave was indicted for murder with two others as accessories, and they being all surrounded by an angry and threatening crowd of people and being in irons, the principal was struck in the face by one much excited, and bidden to tell all about it, and the defendant was bidden to tell all about it or the crowd would hang him, confessions made within an hour of these demonstrations, the crowd still continuing, were inadmissible. George, 50 (5 Jones), 233. Lawson, 61 (Phil.), 47.

Where confessions made on the preliminary trial before the justice are ruled out because the defendant had not been cautioned, subsequent confessions made shortly after the trial may be proven by the state. Needham, 78—474.

Where defendant was arrested by the sheriff and three other men, and others afterwards joined the party, and while on their way to a magistrate the defendant made certain confessions, "no threats, or promises, or violence" being used, such confessions are admissible. Houston, 76—256.

Where defendant was the servant of the witness who had given him a coat and a drink some two weeks after the trial upon which the alleged perjury was committed, when the prisoner was not under arrest, and it was not proved whether or not he had been threatened with prosecution, and witness "didn't think he had held out any inducement," and defendant knew that witness and the prosecutor were intimate, a confession by the prisoner that he had sworn falsely, was admissible. Ricketts, 74—187.

Where one, who had from facts and circumstances, satisfied himself of the guilt of the prisoner, who was a slave and had previously been in the service of the witness, told him that he might as well tell all about it, for he (the witness) was satisfied; and again, being a little angry, said to the prisoner: "If you belonged to me I would make you tell," and repeated the first declaration several times, to which the prisoner each time made a denial of the charge, but afterwards, of his own accord, the prisoner took the witness aside and made a full disclosure, the confession is admissible. Patrick, 48 (3 Jones), 443.

Where a magistrate on examination of a prisoner accused of robbery of a watch and on whom the watch was found, told him "that unless he could account for the manner in which he became possessed of the watch he should be obliged to commit him to be tried for stealing it," this is no such threat or influence as would prevent the introduction of the subsequent confession of the accused, especially where the magistrate repeatedly warned him not to commit himself by any confession. Cowan, 29 (7 Ire.), 239.

Confessions made by a prisoner in jail may be received in evidence against him if not unduly obtained. Jefferson, 28 (6 Ire.), 305.

When a prisoner is advised to tell nothing but the truth, or even when what is said to him has no tendency to induce him to make an untrue statement, his confession, in either case, is admissible, whether made to an officer or a private individual. Harrison, 115—706.

WHEN QUESTIONS OF LAW OR FACT FOUND BY THE JUDGE REVIEWABLE.—Whether a prisoner's confessions are voluntary or induced by hope or fear, is a question of fact to be decided by the judge, and his finding is conclusive. What constitutes such hope or fear is a matter of law, which is reviewable upon exception taken below. Vann, 82—631.

CONFESSIONS—WHEN ADMISSIBLE.—The fact that the committing magistrate told the defendant, who was accused of robbing a person of his watch, "that unless he could account for the manner in which he became possessed of the watch, he should be obliged to commit him to be tried for stealing it," does not amount to such a threat or influence as will prevent the admission of the subsequent confessions of defendant, especially as the magistrate repeatedly warned him not to commit himself by any confession. Cowan, 29 (7 Ired.), 239.

CONFESSIONS AFTER CAUTION RECEIVED.—When one charged with crime has received a proper caution, confessions afterwards made are admissible though he may formerly have made confessions which were extorted by threats, or induced by promises. Scoates, 50 (5 Jones), 420.

Where confessions had been illegally exacted, and the accused was told that they had been illegally and wrongfully extracted and could not be used against him, and he was fully cautioned against making further confessions, it was held that voluntary confessions subsequently made were admissible. Gregory, 50 (5 Jones), 315.

Confessions made while in custody, but after being cautioned not to answer criminating questions, are admissible. Patterson, 68—292.

The prisoner was a witness upon the coroner's inquest, and denied all knowledge of the alleged homicide, but within three or four hours afterwards was arrested as one of the guilty parties, and then proposed to tell all she knew about the homicide, and accordingly gave material evidence against herself: *Held*, that such confessions were voluntary and admissible. Wright, 61 (Phil. Law), 486.

Where confessions are extorted from a prisoner, and afterwards, not being actuated by the influence that had elicited such confessions, he makes other confessions of his guilt, the latter confessions are admissible. Fisher, 51 (6 Jones), 478.

A prisoner in jail said to a fellow-prisoner, "If you will not tell on me I will tell you something." The other replied that he would not tell, but if he did it would make no difference, for one criminal could not testify against another. The former then added, "I want to know what to do," to which the other replied that if he knew the circumstances he could tell him what to do: *Held*, that confessions of murder made thereupon by the former to the latter were admissible. Mitchell, 61 (Phil. Law), 447.

The prisoner was charged with infanticide, and, during a *post-mortem* examination of the body of the infant, seemed very much excited. The examination being finished, and the verdict of the jury having been rendered against her, the prisoner, in answer to questions put by the foreman of the jury, confessed her crime. "The coroner cautioned her after the first question was put, telling her not to answer, it was none of his business and that her answers might be used against her": *Held*, that the caution came too late, and the confession having been made under circumstances of such mental distress, was inadmissible. Matthews, 66—106.

The prisoner made outcry that deceased was accidentally burned to death, and claimed that in attempting to put out the flames she burnt

one of her hands, but the examining physician testified on the coroner's inquest that deceased was not burned before, but after death, there being no serum in the blisters. The coroner then compelled the prisoner to unwrap her hand, and there was no indication of any burn upon it: *Held*, that evidence of the condition of prisoner's hand at the inquest was admissible on the trial, since any circumstance tending to show the guilt of the accused may be proved, though it is brought to light by a declaration inadmissible *per se* as having been obtained by improper influence. *Distinguishing State v. Jacobs*, 5 Jones, 259. *Garrett*, 71—85.

Confessions, whether extorted or not, that relate a number of circumstances, all of which are proved to exist by other testimony, are admissible. *Moore*, 2 (1 Hay.), 556.

The fact that an officer pointed his pistol at the accused to effect his arrest, advising him to give up, does not render incompetent the subsequent admissions of the prisoner, especially where no threats or promises were made to induce them, and the conduct of the prisoner showed that he had no actual fear of violence. *DeGraff*, 113—638.

The fact that a prisoner is kept tied during his examination before the justice does not of itself constitute a valid objection to the admission of confessions made before the magistrate, unless it appeared that he was tied so as to produce pain or to tend to induce or extort from him such confession. *Rogers*, 112—874.

Confessions will not be excluded on the ground that defendant did not have time to advise with counsel before making such statements, where it does not appear that defendant asked and was denied time and opportunity to do so. *Rogers*, 112—874.

ABSENCE OF WRITTEN EXAMINATION MUST BE SHOWN.—To authorize the introduction of parol evidence as to confessions of a prisoner taken before an examining magistrate it must appear affirmatively that there was no examination recorded as required by the statute. *Mathews*, 66—106.

Confessions before a justice of the peace may be admitted in evidence though not reduced to writing. *Irwin*, 2 (1 Hay.), 112, (130). *Parish*, 44 (Bus.), 239.

INFLUENCE PRESUMED TO CONTINUE.—Where a prisoner has once been induced to confess through hope or fear, confessions subsequently made are presumed to proceed from the same influence until the contrary be shown by clear proof. *Roberts*, 14 (3 Dev.), 259.

If promises or threats have been used to induce a confession it must be made to appear that their influence has been entirely done away with before subsequent confessions can be deemed voluntary and admissible. *Drake*, 113—624.

The admissions of guilt of one who had, prior to making such admissions, been induced by fear or hope to confess himself guilty, can not be used against him unless it be shown by irrefragable evidence that the motives inducing the first confessions had ceased to operate. *Lawhorne*, 66—638.

Where a party has been induced to confess through a promise of immunity from prosecution, in the absence of clear proof that such inducement had ceased to operate, his confessions made thereafter are inadmissible. *Lawhorne*, 66—638.

PAROL EVIDENCE OF CONFESSIONS BEFORE MAGISTRATES, WHEN ADMISSIBLE.—Before parol evidence of a prisoner's confessions made before the committing magistrate can be admitted, it must appear that the magistrate did not take the examination in writing, or that the same is lost. *Parish*, 44 (Busb.), 239.

Where parol evidence of a prisoner's confessions before the committing magistrate is objected to in general terms, and the solicitor, supposing the

ground of objection to be that they were not voluntary, proceeds to remove that objection, and the confessions are received, the prisoner is not precluded from insisting in the supreme court that there was no evidence that the prisoner's examination was not reduced to writing, or that the same was lost. *Parish*, 44 (*Busb.*), 239.

CONVICTION ON CONFESSION ALONE.—One may be convicted on his own voluntary confessions alone. *Cowan*, 29 (7 *Ired.*), 239.

HOW COMPETENCY DETERMINED.—In determining the competency of a confession the true inquiry is whether the inducement offered was such as to lead the prisoner to suppose it would be better to confess himself guilty of a crime he did not commit. *Harrison*, 115—706.

APPEALS TO SUPERSTITION.—Upon the trial of a prisoner for murder of her husband, a witness testified that he, as a detective, representing himself as a laborer, went to the house of the prisoner, who told him she was in great trouble, because some one had killed her husband, and that she knew who did it. He then said to her, "You had better tell me all about it. I am a right good old monger doctor. I can work roots and gummer folks, and if you will tell me all about it I can give you something so you can not be caught." Thereupon she told witness that she procured another to kill her husband: *Held*, that the confession was admissible, since the inducement offered appealed only to her superstition, but was not a temptation to lead her, if innocent, to pretend that she was guilty. *Harrison*, 115—706.

FACTS LEARNED IN CONSEQUENCE OF INADMISSIBLE CONFESSIONS.—While the declarations and admissions of a defendant, made after threats or inducements held out to him, are as a general rule incompetent, yet facts ascertained in consequence of such declarations or admissions, and declarations connected with and explaining such facts, are admissible. *Winston*, 116—990.

DEFENDANT'S ACTS IN CONSEQUENCE OF INDUCEMENTS.—It was competent for a constable who had arrested the defendant to testify that, after he told defendant that he knew about the stolen goods and that it would be best for him to tell, the defendant showed him where the goods were hidden. *Winston*, 116—990.

WHEN CONFESSIONS NOT ADMISSIBLE FOR WANT OF CAUTION.—Where defendant, on his preliminary examination, is told by the justice that he is charged with selling stolen corn, and if he wants to tell anything he could do so, but it is just as he pleases, a statement then made is inadmissible for want of proper caution, and the fact that such statement is rather in the nature of a denial makes no difference. *Rorie*, 75—148.

CONFESSIONS TO OFFICER.—Defendant confessed to the officer who had him under arrest that he had stolen the money under a promise that if he would confess and compromise the matter he would be released. This confession was objected to and ruled out. A day or two afterwards, on his examination before a magistrate, he asked to be sworn as a witness in his own behalf, and after having been properly cautioned, stated that he had made the confession under the belief that he could compromise it and be released, but that he had not stolen the money: *Held*, that his statement under oath before the magistrate was competent against him. *Distinguishing State v. Lawhorn*, 66—638. *Ellis*, 97—447.

The facts that a defendant was in arrest, and secured by a handcuff placed on one hand, and connected by a chain with a buggy in which he was riding with the officer who had in his pocket the warrant under which he had been committed to jail on a charge of larceny, do not of themselves constitute duress sufficient to exclude confessions made under such circumstances, there being no threat or advantageous offer to arouse hope or excite fear. *Whitfield*, 109—.

JUDGE DECIDES WHETHER CONFESSIONS ADMISSIBLE—WHEN HE MAY BE REVIEWED.—What amounts to such threats or promises as render confes-

sions inadmissible as being not voluntary; what evidence the judge will hear to establish the facts of threats or promises, and whether there be any evidence to show that the confessions are not voluntary, are questions of law, and the decisions of the judge upon them are subject to review in the supreme court.

Whether the evidence, if true, proves the fact of threats or promises; whether the witnesses testifying to the court as to such facts are worthy of credit; and, in case of conflict, which of them is to be believed, are questions of fact for the judge, and his decision upon them is not subject to review. Andrew, 61 (Phil. Law), 205.

PROMISE TO MARRY DEFENDANT IF HE WOULD CONFESS.—The promise of a female to marry the prisoner on condition that he would confess his crime to her is not sufficient to exclude such confessions, since the promise is only of some collateral advantage entirely disconnected from the charge. Hardee, 83—619.

12. CORROBORATION.

The former statements of a witness made without the sanction of an oath, similar to those made on the stand may be admitted in evidence, *if he is impeached*, to sustain the personal credibility of the witness, but not for the purpose of confirming his statement as to the facts sworn to on the trial. Such testimony is not admissible to confirm the statement of another witness testifying to the same effect. Parish, 79—610.

A witness who has been impeached may be corroborated by showing that he made similar statements at other times, and may prove the statements by himself. Rowe, 98—629.

It is competent to show that the prisoner made false and contradictory statements in reference to the crime with which he is charged. *Ib.*

Corroboration by proving consistent statements made at other times can not be considered as substantive evidence of the truth of the facts any more than other hearsay evidence. Parish, 79—610. Rowe, 98—629.

Even the witness impeached may testify as to consistent statements previously made. Whitfield, 92—831. Rowe, 98—629.

Corroborating evidence is not confined to cases where the adverse party produces evidence of statements made by the witness *inconsistent* with what he testified to on the trial, but such evidence may be offered at once by the party introducing the witness. Whitfield, 92—831.

Where the credibility of a witness is attacked, from the nature of his evidence, from his situation, from bad character, from proof of previous inconsistent statements, or from imputations directed against him on cross-examination, the party who has introduced him may prove other consistent statements for the purpose of corroborating him. George, 30 (8 Ire.), 324. March v. Harrell, 46 (1 Jones), 329. Twitty, 9 (2 Hawks), 449.

13. DECLARATIONS OF OTHERS.

What was said by a third person in the presence and hearing of the defendant is admissible. Ludwick, 61 (Phil.), 401.

The state has a right to prove the whole of a conversation that took place between the witness and the accused, although in that same conversation the witness in answer to questions asked by the accused expresses the opinion that the prisoner committed the crime and gave his reasons for that opinion. Williams, 68—60.

On indictment for infanticide, testimony that the witness heard the mother of the accused say, in the presence of accused, that "she had a child this way before and put it away," to which the prisoner made no

reply, is inadmissible, since it is evidence of a distinct substantive offence. Shuford, 69—486.

What bystanders said immediately after the commission of a homicide is not competent evidence. Dunlop, 65—288.

Evidence that the witness told defendant that defendant's daughter had told witness that defendant had stolen certain property is competent, since defendant was entitled to the benefit of any reply he made to the charge. Orrell, 75—317.

Where declarations made in the presence of the defendant are given in evidence, it is proper to leave it to the jury to say whether defendant heard such declarations; also to determine what value should be attached to the circumstance as proof of guilt and what defendant's conduct was at the time. Bowman, 80—432.

Evidence directly tending to show that a third party committed the crime is admissible for the defendant. Davis, 77—483.

But declarations of a third party that he committed the crime are not admissible. Boon, 80—461.

Where one of two defendants submits it is not competent to introduce the record of his submission on the trial of his co-defendant as evidence confirmatory of the prosecutrix. Queen, 66—615.

Evidence that the measurement of certain tracks had been applied to the brother of the defendant, who had been at first arrested for the offence, and that the measurement did not correspond, is not admissible. England, 78—552.

FLIGHT AND CONFESSION OF THIRD PERSON.—Evidence that after the commission of the crime another person living in the neighborhood fled, is not competent for defendant, nor is it competent for defendant to prove that such third person made a confession. May, 15 (4 Dev.), 328.

14. DEFENDANT'S DECLARATIONS.

Declarations of a party accused of a crime made in his own favor after the time of the alleged commission of the crime are not evidence for him. Hildreth, 31 (9 Ire.), 440. Brandon, 53 (8 Jones), 463.

What a man says when charged with crime is competent evidence for him. Worthington, 64—594.

Declarations of defendant, made after the commission of alleged perjury, repeating the statement made under oath, are incompetent, notwithstanding the state has introduced conflicting declarations. Rickett, 74—187.

Where a witness is impeached, either by contradictory testimony, or by an attack on his character, his declarations to a third person, made soon after the transaction, may be stated by himself and afterwards shown by such third person by way of corroboration. Staton, 114—813.

The declarations of a prisoner made immediately after and not during the transaction constituting the offence with which he is charged are not admissible in evidence, except as corroborative of his evidence if he has availed himself of the privilege of testifying in his own behalf. Edwards, 112—901.

Defendant's own account of the transaction related immediately after it occurred is incompetent, though no third person was present. Tilley, 25 (3 Ire.), 424.

Where a person is charged with an offence, and this evidence is produced against him, he has a right to have what he said in response proven. Worthington, 64—594. Patterson, 63—520. McNair, 93—628.

15. DEFENDANT'S ACTS.

It is not error to permit a witness for the state to testify that, in consequence of statements made to him by the defendant, he and defendant went to a certain place in the woods when defendant pointed out to him the stolen hog. *Lindsey*, 78—499.

A defendant under arrest for stealing corn may be compelled by the officer having him in charge to put his foot in a track found in the field for the purpose of comparison, and the result of that comparison is admissible evidence on the trial against the defendant. *Graham*, 75—646.

Evidence of the acts of persons accused of murder, as well as their declarations, may be excluded when the acts or confessions were the result of the influence of hope or fear, and where the record is silent on the point whether the trial judge determined the question preliminary to the admission of such evidence as to whether such acts or confessions were the result of hope or fear excited, it will be presumed that he admitted the evidence without a determination of the preliminary question, and his action will be reviewed. *Crowson*, 98—595.

The court has no right to compel a defendant to exhibit himself to the jury. *Jacobs*, 50 (5 *Jones*), 259.

SILENCE WHEN ACCUSED.—Where a person is charged with a crime and makes no denial, his silence is a circumstance which may be left to the jury. *Swink*, 19 (2 *D. & B.*), 1.

It is competent to show the condition of defendant's hand at the time of holding the inquest, she having declared it was burnt, when in fact it was not, though she was made to exhibit her hand by the coroner despite her objection. *Garrett*, 71—85.

A defendant under arrest for stealing corn may be compelled by the officer having him in charge to put his boot or shoe in a track found in the field for the purpose of comparison, and the result of that comparison is admissible evidence on the trial against the defendant. *Graham*, 74—646.

Silence when accused of a crime is a circumstance to be considered by the jury, together with other circumstances, in deciding the question of guilt. *Swink*, 22 (2 *D. & B.*), 9.

The state may show that defendant was seen at different places, by different witnesses, at short distances apart. *Boggan*, 120—590.

16. DEPOSITIONS.

Sec. 139. Depositions to be taken, affidavit before clerk. 1891, c. 522. 1893, c. 80.

(1) In all criminal actions pending before the superior court it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court in which said action is pending, that it is important for his defence that he have the testimony of any person or persons, whose names must be given, and that such person or persons [are] so infirm, or otherwise physically incapacitated, or non-resident of this state, that he can not procure their attendance at court.

(2) Upon the filing of said affidavit it shall be the duty of the clerk to appoint some responsible person to take the deposition of said person, which deposition may read in the trial of said crim-

inal action under the same rules as now apply by law to depositions in civil actions: *Provided*, that the solicitor of the district in which said suit is pending have ten (10) days' notice of the taking of said deposition, who may appear in person or by a representative to conduct the cross-examination of such witness.

Where there are several defendants in the same bill it is not necessary to notify each of the others of the taking of a deposition by one as evidence on his behalf. Finley, 118—1161.

A deposition is competent in favor of one defendant although it contains testimony charging his co-defendant with committing the crime; but it is not to be considered as evidence against the co-defendant charged with the crime, but only as evidence in favor of the defendant who offers it. Finley, 118—1161.

17. DISCREDITING OWN WITNESS.

While a party may not discredit his own witness, still he can show the facts to be different from those testified to by such witness. Mace, 118—1244.

The state may discredit its own witness by showing that on former occasions he had made different statements to that in court. Norris, 2 (1 Hay.), 495.

Where a solicitor for the state, as upon affidavit, asserts upon the authority of a witness, who is present, any matter material to the issue, and afterwards such witness testifies differently, it is competent to introduce testimony to show the diversity to discredit the witness. McQueen, 46 (1 Jones), 177.

18. DYING DECLARATIONS.

Where a wounded person has been told by a physician that his injury is fatal, and states himself that the wound will produce death, his dying declarations are properly received in evidence. Finley, 118—1161.

A witness who proposes to testify as to dying declarations can refresh his memory by looking at a deposition of deceased, taken in his presence, although such deposition is not competent as evidence in chief. It is not essential that the witness should himself have written the deposition. Finley, 118—1161.

A charge that dying declarations should be received "cautiously, not superstitiously," is a sufficient response to a prayer that they be received with caution. Whitson, 111—695.

Dying declarations written down at the time can be used only to refresh the witness' memory. Whitson, 111—695.

Although a conversation which took place between a witness and the deceased immediately after the latter was fatally wounded, in which he described the number and location of his wounds and the character of his sufferings and stated his belief that he was killed (it being in evidence that he died 48 hours after the wounds inflicted), was not a part of the *res gestae*, yet it, as well as the statement of what deceased said about the transaction, would have been competent as dying declarations. Whitt, 113—716.

Where deceased told his physician that he knew he was going to die, his declaration made afterwards is not rendered inadmissible by the fact that the physician told him that he thought deceased would die but hoped he would not, and that another person told him his physician had hopes for him. Caldwell, 115—794.

Declarations of deceased that he was poisoned by certain individuals, not made immediately previous to his death but at a time when he despaired of his recovery and felt assured his disease would prove fatal, are admissible. Poll, 8 (1 Hawks), 442.

An affidavit made by deceased before a magistrate immediately after wounds from which he subsequently died, was admissible as corroborative of declarations, made on the same afternoon, in contemplation of death, although he expressed no expectation of death at the time of making such affidavit. Craine, 120—601.

Where deceased made statements in contemplation of impending death, such declarations did not subsequently become incompetent because, contrary to his expectations, he lived five months afterwards. Craine, 120—601.

The exclamation of one who is killed made simultaneously with the infliction of the mortal wound and immediately preceding his death, in the presence of his slayers, is competent as a dying declaration, and also as a statement made in the presence of the accused. Mace, 118—1244.

WHEN JUDGE'S DECISION REVIEWABLE.—The decision of the trial judge as to the admissibility of the declarations of a deceased person, made just before death, comprises a decision both of *fact* and of *law*. *Of fact*, as to what were the declarations, and as to the circumstances under which they were made. *Of law*, as to whether the declarations were admissible alone or in connection with the circumstances. On the former his decision is final; on the latter it is subject to review. Williams, 67—12.

RESTRICTED TO THE ACT OF KILLING.—Dying declarations must be restricted to the act of killing and the circumstances immediately attending the act and forming a part of the *res gestae*. Shelton, 47 (2 Jones), 360.

ONLY ADMISSIBLE WHEN DECLARANT COULD HAVE TESTIFIED TO SAME THING.—The dying declaration of the deceased, who was shot at night in a house from the outside through an aperture in the logs, that "It was E. W. who shot me, though I did not see him," is inadmissible, since it was the expression of an opinion of the deceased as to the identity of his assailant with the prisoner, which opinion was not the direct result of observation through any of his senses, and dying declarations are only admissible where the declarant could have been competent to testify to the same thing if sworn in the case. Distinguishing *State v. Arnold*, 13 Ired., 184. Williams, 67—12.

WHEN DECLARATIONS MADE NOT IN EXTREMIS COMPETENT.—Where the declarations of the deceased have been offered in evidence, and an attempt has been made on the other side to destroy the effect of such declarations by showing the bad character of the deceased, the state, for the purpose of corroborating the evidence, may prove that deceased made other declarations to the same purport a few moments after he was stricken, though it did not appear that was then under the apprehension of immediate death. Thomason, 46 (1 Jones), 274.

DECLARATIONS MADE BEFORE OR AFTER DECEASED SAID HE SHOULD DIE.—It makes no difference whether the declarations were made before or after deceased said he was bound to die, where the declarations were made in the same conversation in which he said he would die, and there is no suggestion that there was any material change in his condition, or that he became suddenly worse. Peace, 46 (1 Jones), 251.

SUBSEQUENT HOPE OF RECOVERY.—If the deceased, at the time he made the declarations, was, in fact, in a condition to make them competent evidence, a hope of recovery at a subsequent time would not render them incompetent. Tilghman, 33 (11 Ired.), 513.

NOT NECESSARY THAT DECEASED SHOULD BE IN THE VERY ACT OF DYING.—In order to make the declarations of a deceased person evidence as "dying

declarations," it is not necessary that the person should be in the very act of dying; it is sufficient if he be under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn as if an oath had been administered. Tilghman, 33 (11 Ired.), 513.

DECLARATIONS OF WIFE KILLED BY HUSBAND AS TO HER ADULTERY.—On indictment of a husband for killing his wife, evidence of the declarations of the deceased wife that she had been guilty of adultery is irrelevant, besides, the rejection of such testimony could do the prisoner no harm, since it would have gone strongly to prove the malice charged. Rash, 34 (12 Ired.), 382.

DECLARATIONS MADE BEFORE THE KILLING.—Declarations of the deceased to a witness, who met her a few miles from the place where she was murdered, that she expected to meet the prisoner at the place whither she was going and where she was killed, are not admissible against the prisoner. Dula, 61 (Phil. Law), 211.

LANGUAGE OF PHYSICIAN CALCULATED TO EXCITE HOPE.—Where deceased states repeatedly, "I am bound to die, I am shot in the side and back and am bleeding internally," and then states that he was shot by the prisoner, and died of the wounds in a few days afterwards, such statements are admissible as dying declarations, notwithstanding that a physician, between the time the declaration was made and the death, used language to the deceased calculated to inspire the hope of recovery. Mills, 91—581.

ADMISSIBLE AS CORROBORATIVE.—Where there is evidence tending to contradict the dying declarations of the deceased, it is competent for the state to prove that he made similar statements immediately after the fight, though it did not appear that he was then under the apprehension of immediate death. Blackburn, 80—474.

A declaration of the deceased that he was afraid another person than the prisoner would kill him, is incompetent. Patrick, 48 (3 Jones), 443.

19. EXAMINATION OF PAPER.

When counsel puts a written document in the hands of a witness and asks him whether it is in his handwriting, and then proceeds to found any question on such document, the counsel on the opposite side has a right to see it; the probable exception to this rule being where counsel after handing the document to the witness goes no further. Williams, 91—599.

20. EXPERTS.

The opinion of an expert is competent only when founded on facts within the personal knowledge or observation of the expert, or upon the hypothesis of the finding of the jury. Bowman, 78—509.

A witness who is not an expert may express his opinion as to the state of mind of another witness during certain periods. Ketchey, 70—621.

Whether or not a witness is an expert is a question of fact for the court, and his finding is conclusive. Cole, 94—958.

A physician who states that he is able to give an opinion as to the effect of poison on brute animals, is competent to testify as an expert, though he has never treated such a case in his practice. Sheets, 89—543.

A physician who qualifies himself in other respects is not precluded from testifying as an expert because he has not been examined by the state board of medical examiners. Speaks, 94—865.

Where the prisoner, on indictment for murder by poisoning, stated at the time of the death, that the deceased had had a similar attack some

years before for which a certain physician attended her, the physician is a competent witness to give an account of such previous illness. Cole, 94—958.

An expert may be asked his opinion, based on evidence already offered, if the jury believe such evidence. Such opinion must not be the positive opinion of the expert, founded on his own observation and the testimony of others, but must be wholly contingent upon the facts as the jury shall find them to be. *Ib.*

A physician testifying as an expert may be asked this question: "Assuming that the jury should believe that the prisoner and deceased were about the same height, and that the pistol was fired by the prisoner in the manner and position testified to by the state's witnesses, what, in your opinion, would have been the range of the shot after entering the skull, taking into consideration the bone, muscles and other substances of the head?" Distinguishing *State v. Bowman*, 78—509. Keene, 100—509.

On the trial for infanticide, where it appeared that there were no marks of violence on the child, it was not erroneous to admit the testimony of an expert that there were several modes of causing death without leaving on the body any evidence of violence. *Morgan*, 95—641.

Any person who has opportunities of knowing and observing a person whose sanity is disputed, may, whether expert or not, give an opinion, based on such knowledge or information, as to his sanity. *Potts*, 100—457.

Experts alone can give an opinion upon facts shown by others, assuming them to be true. *Potts*, 100—457.

A physician testifying as an expert may state his opinion, based on the evidence and assuming it to be true, as to whether the throat of the deceased, who was found in the woods about three months after the killing, was cut with a knife or torn by beasts, though he admits that he has never seen or read of a case of the sort. *Clark*, 34 (12 Ired.), 151.

A witness, not an expert, may testify that the measurement of certain tracks correspond with the boot of the prisoner in size and shape, though the measurements and comparisons were made in the absence of the prisoner, and without notice to him. *Morris*, 84—756.

There being evidence that the deceased came to his death by the infliction of whippings by the prisoner, whilst the latter insisted that the death was caused by a burn, of which there was an appearance on the abdomen, the testimony of a physician, an expert, that in his opinion the burn was inflicted *after* death, is admissible. *Harris*, 63—1.

In such case it is competent for the prisoner to show that deceased *said* he had a large burn on his abdomen, such declarations being admissible as natural evidence. *Ib.*

It is error to allow a witness to testify as an expert, the defendant objecting, without any preliminary examination of his opportunities for acquiring professional knowledge and skill, and defendant is entitled to the benefit of his objection in the supreme court, though he failed to state the particular ground of his objection in the court below. *Secrest*, 80—450.

On a trial for murder by poisoning, a physician stated that he had heard the statements of the witnesses as to the circumstances immediately preceding the illness of the deceased, and the appearance and condition of the body immediately after death, and could therefrom form an opinion as to the cause of death, and was thereupon permitted to testify what, in his opinion, was the cause of death: *Held*, that the opinion of the expert thus expressed, based on the testimony of the witnesses, assuming the truthfulness and accuracy of the same, and not founded on facts within the personal knowledge and observation of the expert, or upon the

hypothesis of the finding of the jury, was not admissible. Bowman, 78—509.

On indictment for murder by poison, a medical expert, who states that he can tell the ingredients of the bottle containing the poison administered from its smell, taste and appearance, may give his opinion as to what the mixture is composed of and its effect upon a woman in pregnancy and the danger to life, though he has made no chemical analysis. Slagle, 83—630

When the genuineness of a paper, or of a signature to a paper, which it is proposed to make the basis of a comparison of handwriting, is not denied nor can not be denied, an expert may, in the presence of the jury, compare it with another paper or signature, the genuineness of which is questioned. Noe, 119—849.

A bond given by defendant for his appearance to answer a criminal charge and constituting a part of the record, is admissible on his trial for a forgery for the purpose of comparison, by an expert, with a signature whose genuineness is questioned, the presumption being that the signature to the bond is genuine. Noe, 119—849.

A witness who has served four or five years as register of deeds, has had occasion to examine signatures, has been frequently called upon to prove signatures of deceased persons in the clerk's office, who has used magnifying glasses to detect erasures, and further testified that he has had such experience that he can compare a writing with one known to be genuine and determine the genuineness of the former, is properly qualified and competent as an expert to make such comparison. DeGraff, 113—688.

An admittedly genuine signature to an affidavit made by an accused person in the case in which he is being tried is a proper criterion for the comparison of incriminating writings purporting to be signed by him. DeGraff, 113—688.

A witness, offered as an expert, testified that he had been a bookkeeper for many years, was secretary and treasurer of the city, and, as such, it was his duty to compare handwritings to determine which are genuine and which are not; that he had been in the business fifteen years, and his experience had been such that he could compare a paper with one known to be genuine and determine the genuineness of the former: *Held*, that he was competent to compare a signature admitted to be the prisoner's with one attached to a paper found on the person of the deceased. DeGraff, 113—688.

A witness who some years before was much in the habit of receiving and paying notes of a particular bank, and was an attentive observer of such notes, is competent to prove the genuineness or forgery of a note on that bank, although he may never have seen the president and cashier write, and has never received any letters from them. Candler, 10 (3 Hawks), 393.

A physician, examined as a witness, stated that he had examined the prisoner and was of the opinion that she had been delivered of a child within three or four days, and it was proposed to ask him "whether from his experience and knowledge of females in three or four days after the delivery of a child, and under the circumstances detailed by the evidence, the prisoner was in a frame of mind to give an intelligent answer or know what she was talking about": *Held*, that the question was proper, and it was error to exclude it. Matthews, 66—106.

The opinion of an expert, warranted only by assuming the truthfulness and accuracy of what has been testified to by witnesses, is not admissible. Bowman, 78—509.

A witness who has never seen a person write, nor received letters from him, and who has no knowledge of his handwriting except that derived from having received bank notes in the course of business, which pur-

ported to be signed by the person as president of the bank, and were reputed to be genuine, is incompetent to prove his handwriting. *Allen*, 8 (1 *Hawks*), 6.

A person who has been the owner and manager of slaves and who has given much attention to the effects of the intermixture of the races and believes he can distinguish between the descendants of white persons, negroes and Indians, is competent to testify as an expert as to whether a person has African blood in him. *Jacobs*, 51 (6 *Jones*), 284.

In all matters of art and science the opinions of experts are evidence touching questions in that particular art or science, and it is competent to give in evidence such opinions when the professors of the science swear they are able to pronounce them in any particular case, although at the same time they may say that precisely such a case had not fallen under their notice in the course of their reading. The effect of their evidence is for the jury. *Clark*, 34 (12 *Ire.*), 151.

The modes of proving handwriting are by the evidence of those:

1. Who have seen the person write, which is the most certain.
2. Who in the course of correspondence have received pertinent answers to letters written to the person, or other letters of such a nature as to render it highly probable that they were written by the person.
3. Who have inspected and become acquainted with ancient, authentic documents bearing the signature of the person. *Allen*, 8 (1 *Hawks*), 6.

The testimony of a physician as to the nature and extent of the wounds is admissible to corroborate the testimony of the prosecutor that defendant had assaulted him with a deadly weapon. *Haynie*, 118—1265.

21. IDENTITY OF ACCUSED.

A witness may properly be asked to look around the room and point out the person who committed the offence. This is not making the defendant give evidence against himself. *Johnson*, 67—55.

22. INSUFFICIENT EVIDENCE.

The granting or refusing a new trial is not reviewable, whether the motion is made because the verdict is against the weight of the evidence, or that the evidence was insufficient to convict. *Kiger*, 115—746.

Where there is no evidence sufficient to go to the jury the judge may withdraw the case from the jury, but if the evidence is merely weak, and such as would not induce the judge, if a juror, to convict, he has no authority to withdraw the case. *Kiger*, 115—746.

An objection that there was no evidence sufficient to go to the jury can not be taken for the first time in the supreme court. *Kiger*, 115—746.

It is too late after verdict to raise the point that there was no evidence to go to the jury sufficient to convict. *Kiger*, 115—746.

Where there is an assignment of error that the evidence did not justify the verdict the supreme court will consider only the evidence offered by the state. *Hart*, 116—976.

It is only where the evidence, in no aspect of it, would reasonably warrant the jury in drawing the inference that the defendant is guilty that the trial judge should withdraw the case from the consideration of the jury. *Green*, 117—695.

Exceptions to the sufficiency of the evidence must be taken before verdict. *Furr*, 121—606.

Whether the evidence is such as to justify the jury in rendering a verdict is a preliminary question for the supreme court on appeal. *Satterfield*, 121—558.

NEED NOT GIVE REASON FOR OBJECTION TO EVIDENCE.—Counsel for the prisoner is not bound to tell the solicitor his reasons for objecting to the introduction of the testimony, to-wit, that there was no proof that the examination had not been reduced to writing, and may make that objection in the supreme court. *Parish, 44 (Bus.), 239.*

23. JUDGMENT OF COURT OF ANOTHER STATE.

A certified judgment of a court of another state unaccompanied by the whole record is not in compliance with the act of congress (The Code vol. 2, page 732), and is inadmissible. *Misenheimer, 123—758.*

24. LAWS OF OTHER STATES AND COUNTRIES.

The existence of a foreign law is a question for the jury, but that fact being ascertained its construction and effect are questions for the court. *Jackson, 13 (2 Dev.), 563.*

A person who claims to know the provisions of the common or unwritten law of a foreign country may, under section 1338 of The Code, testify to and explain them. *Behrman, 114—797.*

The existence of a foreign law is a question for the jury, but that fact being established, its construction and effect are questions for the court. *Jackson, 13 (2 Dev.), 564.*

The certificate of the secretary of state in relation to the statutes of another state is evidence in criminal as well as civil cases. *Patterson, 24 (2 Ired.), 346.*

The printed statute book of another state is not evidence to show what the law of that state is; it can only be shown by a copy authenticated by the seal of the state which enacted it. *Twitty, 9 (2 Hawks), 441.*

25. MENTAL OR BODILY FEELINGS.

Defendant was indicted for stealing a mare which was found in another state in the possession of B, who testified that he obtained the mare from defendant. Defendant denied that the mare he traded to B was the property of the prosecutor, and the state, as tending to establish the identity of the mare, was allowed to prove, under objection, that the owner's son exclaimed on finding the mare, "That's father's mare!" *Held*, that such exclamation was inadmissible. It is only when the bodily or mental feelings or conditions of an individual are material to be proved that the usual expressions of such feelings are admissible. *Distinguishing State v. Harris, 63 N. C., 1. Hargrave, 97—457.*

26. NOTICE TO PRODUCE PAPERS.

Four days' notice to a prisoner in close custody to produce a paper traced to his possession, his residence being only about four miles distant, is sufficient to authorize the admission of secondary proof. *Hester, 47 (2 Jones), 83.*

The object of a notice to produce papers is not to *compel* the production of such papers, but to enable the defendant, by having them ready, to protect himself against the possible falsity of secondary evidence. The court has no right to compel a defendant to produce papers. *Hester, 47 (2 Jones), 83.*

Where defendant, after notice to produce papers, objects to their production, the state has a right to prove their contents by secondary evidence. The rule that no man is bound to criminate himself only protects

the accused in the possession of the originals. Kimbrough, 13 (2 Dev.), 431.

27. PAROL EVIDENCE.

The general rule is that where an agreement is reduced to writing and intended by the parties to contain and be evidence of such agreement, or whenever there exists a written document, which by the policy of the law is considered to contain the evidence of certain facts, such instrument is regarded and treated as the best evidence of the agreement or facts recorded; and unless it be in the possession of the opposite party, and notice be given him to produce it, or unless it be proved to be lost or destroyed, secondary evidence of its contents is not admissible. Credle, 91—640.

A paper writing containing matter purely collateral to the issue, which recites no agreement and does not purport to be evidence of any contract, and which defendant did not sign, but which is simply a loose, casual paper intended to serve only a temporary purpose, may be proved by parol, without notice and without proving its loss or destruction. Credle, 91—640.

The rule which requires the production of written instruments to prove their contents does not apply to cases where the writing comes up on a collateral inquiry and a party is not expected to be prepared to produce it. Wilkerson, 98—696.

A notice forbidding all persons trading for or buying the prosecutor's cattle is purely collateral to the issue on indictment for injury to the cattle, and its contents may be shown by parol. Credle, 91—640.

On indictment for false pretences in obtaining a written order from county commissioners for the support of a pauper, when in fact such pauper was dead, the contents of such order may be proved by parol, the essence of the charge being the fraudulent practices and pretences and the order itself being collateral. Wilkerson, 98—696.

On indictment for seduction parol evidence of the contents of a note written by the prosecutrix appointing an assignation with a third person is competent for the purpose of attacking the character of the prosecutrix, since the contents of the note are purely collateral. Ferguson, 107—841.

Where the book of records of a board of township trustees is shown to have been destroyed, the making of an order discontinuing a certain road can be proved by one of the trustees. Durham, 121—546.

Before parol evidence of a prisoner's confessions made before the committing magistrate can be admitted, it must appear that the magistrate did not take the examination in writing, or that the same is lost. Parish, 44 (Busb.), 239.

Where parol evidence of a prisoner's confessions before the committing magistrate is objected to in general terms, and the solicitor, supposing the ground of objection to be that they were not voluntary, proceeds to remove that objection, and the confessions are received, the prisoner is not precluded from insisting in the supreme court that there was no evidence that the prisoner's examination was not reduced to writing, or that the same was lost. Parish, 44 (Busb.), 239.

28. PRIMA FACIE EVIDENCE.

Prima facie evidence is that which is received or continues until the contrary is shown. Mitchell, 119—784.

The term *prima facie* is synonymous with the word "presumptive." Mitchell, 119—784.

29. RECORDS.

The contents of a public record may be proved in any court by the original record itself. The rule allowing a properly certified copy of such record to be admitted in evidence is grounded on the inconvenience of obtaining the original. Voight, 90—741.

RECORD OF CASE, HOW PROVED.—The original record of a case in another court is competent when present, though the proper mode of proving it is by a duly authenticated copy under the seal of the court. Hunter, 94—829.

30. RELATIONS.

While the rule is that the law looks with suspicion upon the evidence of close relations and interested parties, and it must be received with some degree of allowance, yet the rule does not reject or necessarily impeach it, and if, from the testimony, or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn the truth, then they are entitled to as full credit as any other witness. Lee, 121—544.

TESTIMONY OF RELATIONS REGARDED WITH SUSPICION.—It is not error to instruct the jury that the law regards with suspicion the testimony of near relations when testifying for each other. Nash, 30 (8 Ired.), 35.

The credit of a witness related to the party for whom he testifies is thereby affected, and his evidence must be received with some degree of allowance. Boon, 82—637.

Where a wife testifies for her defendant husband it is error to instruct the jury that they should scrutinize her testimony carefully and receive it with grains of allowance, without adding that if the jury believed the testimony it was entitled to full credit, notwithstanding the relationship. Collins, 118—1203.

31. RES GESTÆ.

To constitute *res gestæ* there must be *an act* which may be explained by contemporaneous declarations. Anderson, 92—732.

Declarations of a prisoner made to the officer on being arrested for the alleged offence are not admissible as a part of the *res gestæ*. McNair, 93—628.

32. WRITTEN EXAMINATION.

The written examination of a witness taken down by the coroner, and also the written examination by the magistrate, may be introduced by the defendant for the purpose of contradicting the witness. Pierce, 91—606.

The testimony of a witness taken down in writing by a magistrate can not be used as evidence in chief on the trial, but may be used to show contradictory statements by him. McLeod, 8 (1 Hawks), 344.

The examination of a witness taken before a jury of inquest or an examining magistrate is inadmissible as evidence in chief unless it be shown that the witness is dead. Taylor, 61 (Phil.), 508.

WRITTEN EXAMINATION ON PRELIMINARY HEARING.—The examination of a witness taken before a jury of inquest or an examining magistrate, is inadmissible as evidence in chief, unless it be shown that the witness is dead. Taylor, 61 (Phil. Law), 508.

The written examination of a witness taken at the coroner's inquest is incompetent when nothing is offered to remove objections to its compe-

tency except the fact that the witness' name is endorsed on the bill, and not being called for the state, a summons was issued for him by the prisoner, to which the sheriff returned that he could not be found as, residing in the city, he left home that morning. Grady, 83—643.

33. MISCELLANEOUS MATTERS.

REFRESHING MEMORY.—A witness may refresh his memory by looking at a book of entries kept by himself without producing the book on trial. Cheek, 35 (13 Ired.), 114.

FALSUM IN UNO ETC.—The rule "*falsum in uno, falsum in omnibus*," is not a rule of law in this state. Brantly, 63—518.

SECOND CROSS-EXAMINATION.—After a witness has been cross-examined, it is in the discretion of the trial judge to permit or refuse a second cross-examination. Hoppliss, 27 (5 Ired.), 406.

Where the state calls a witness who is afterwards put on the stand by defendant, the state has no right to cross-examine the witness to discredit him. Taylor, 88—694.

Evidence having been given that a person then on trial for larceny had been charged with the crime by the prosecutor, face to face, it is competent for the defendant to show what his reply was to such accusation. Patterson, 63—520.

PARTY CALLING OUT COLLATERAL MATTER.—One who calls out a statement from a witness, which he subsequently impeaches by another witness, can not object to testimony from the other side in support of such witness on the ground that the statement so called out by himself was *collateral matter*. Kirkman, 63—246.

OATH—FORM OF.—The omission of the witness to repeat the words "So help me, God" is not assignable as error, since the words constitute no part of the oath. Mazon, 90—676.

The fact that a witness was sworn that his evidence "against" the prisoner should be the truth, instead of following the prescribed form of the oath, is not such a substantial departure as to fatally infect the verdict. *Ib.*

A witness may be allowed, for the purpose of corroboration, to testify that another person identified a coat whose identity was in question, without first asking him who identified it if he did so. Brabham, 108—793.

EVIDENCE AS TO AGE OF WITNESS.—A witness may testify to his own age according to the reputation in the family. Best, 108—747.

RUMOR AS TO HOW THE JURY STOOD ON A FORMER TRIAL.—Evidence of a current report as to how the jury were divided on a former trial of the same case is incompetent. Austin, 108—780.

ORDERS AND DECREES.—Evidence of the understanding of a witness as to the meaning and import of orders and decrees is not admissible. They are ascertained by the terms in which they are drawn. Voight, 90—741.

RE-EXAMINATION AFTER JURY RETIRES.—It is not error to permit witnesses who have been previously examined to be recalled and re-examined after the jury have retired to consider their verdict. Noblett, 47 (2 Jones), 418.

SPIES.—It is proper to charge the jury that the testimony of a spy should be scrutinized; but that, after doing so, if they believed his testimony to be true, his motive is not to be considered. Black, 121—578.

EVIDENCE OF EXAMINATION BEFORE CORONER COMPETENT.—The exclusion of a paper containing the examination of a witness before the coroner, and also containing the preliminary examination reduced to writing by the justice, introduced for the purpose of contradicting the witness, is error. Pierce, 91—606.

GRAND JUROR AS A WITNESS ON THE TRIAL.—A grand juror, on the trial of an indictment, may be compelled to disclose what was given in evidence by a witness before the grand jury. Broughton, 29 (7 Ired.), 96.

The fact that a witness was foreman of the grand jury which found the bill does not render him incompetent to testify, especially when he did not vote for the bill. McDonald, 73—346.

EVIDENCE OFFERED FOR SEVERAL PURPOSES.—It is error to exclude testimony offered for several purposes if it is competent for one of the purposes. Goff, 117—755.

PARTY ELICITING ANSWER CAN NOT OBJECT.—A party who elicits an unfavorable answer to a question on cross-examination can not object to such answer. Apple, 121—584.

TOWN CHARTER.—A charter of a town reciting that there was a former charter is no evidence of the powers granted in the former charter. Threadgill, 76—17.

ASSISTANT STATE'S COUNSEL.—Evidence as to who employed counsel to assist the solicitor is irrelevant. Orrell, 75—317.

FINE.—Evidence of irrelevant facts in order to enhance a fine is inadmissible. Johnson, 2 (1 Hay.), 293, (388).

TITLE PAPERS—MOTIVE.—There being no dispute as to ownership, title papers are competent to explain the motives of a party's conduct. Weeks, 12 (1 Dev.), 135.

IRRESPONSIVE ANSWER.—Where an answer of a witness for the state to a question put to him by the state is not responsive, the defendant having failed to exercise his privilege of cross-examining the witness, can not complain because the answer is allowed to stand. Mattock, 119—806.

CONFIDENTIAL COMMUNICATIONS.—A confidential communication between husband and wife can not be admitted in evidence. Brittain, 117—783.

EFFECT OF IMPEACHING TESTIMONY.—A statement made by a witness *in pais*, contradicting that made on the trial and brought in for the purpose of impeaching the integrity of such witness, can not be treated as substantial evidence of the facts involved in the issue. Neville, 51 (6 Jones), 423.

WHEN "BEST IMPRESSION" OF WITNESS ADMISSIBLE.—A witness who testified on a trial for murder that he saw the prisoner with a child in her arms, and was not sure the child was the deceased's, was asked: "Is it your best impression that the child she had in her arms was her son R?" *Held*, to be error to admit the question. A witness can give his "best impression" or memory of a *fact* within his knowledge, but not his impression or inference from what he saw. Thorp, 72—186.

TESTIMONY RECEIVED AFTER EVIDENCE CLOSED.—The reception of additional testimony after the evidence is closed but before a verdict is rendered is a matter of discretion and not reviewable. Jimmerson, 118—1173.

IRRELEVANT BUT PREJUDICIAL.—If evidence be irrelevant, yet if it might have exercised a prejudicial effect on the minds of the jury a new trial will be granted. Jones, 93—611.

STATEMENT BY STATE'S WITNESS TO SOLICITOR.—A voluntary statement by a state's witness made privately to the solicitor may be received in evidence against the author who is afterwards indicted for the same offence. Chisenhall, 106—676.

EXAMINATION BEFORE JUSTICE.—The justice after calling the court to order, but before the warrant was returned, or any of the witnesses had been sworn, and before the defendant had been informed of the charge against him, asked if defendant was ready to proceed, to which he replied that he was not, because of the absence of certain witnesses by whom he

expected to prove a certain state of facts relied on as a defence: *Held*, that the "examination" proper had not then commenced, and any declaration pertinent to the charge then made by defendant was competent, though defendant was not cautioned. *Conrad*, 95—666.

Evidence that facts relied on as a defence on the preliminary examination were contradictory of those relied on at the trial, is competent. *Ib.*

CONTENTS OF AFFIDAVIT FOR CONTINUANCE SHOWN TO BE UNTRUE.—In order to show that defendant made false and contradictory statements in reference to the crime charged against him, an affidavit for a continuance previously filed by him in the cause may be used and its contents shown to be untrue. *Bishop*, 98—773.

STATE MAY CONTRADICT VOLUNTARY STATEMENTS.—Voluntary statements made by defendant while in custody are competent, and the state may contradict them if untrue. *Bishop*, 98—773.

SEAL ON WARRANT.—The question whether there is a seal or not attached to a warrant issued by a justice of the peace, is one exclusively for the trial judge, to be decided by him upon inspection. *Worley*, 33 (11 *Ired.*), 242.

QUESTION OF NUL TIEL RECORD, HOW TRIED.—The question to be tried on a plea of *nul tiel record* is one of fact for the court, and where the court below rejected a paper, offered as a copy of a record, because the seal was so indistinct that it could not be recognized as the seal of any court, the supreme court has no power to examine whether the fact as to the distinctness of the seal be as stated or not. *Isham*, 10 (3 *Hawks*), 185.

ATTORNEY FOR PRISONER AS WITNESS.—Where a witness for the prosecution is sent by permission of the court to the office of the prisoner's counsel and is there examined, one of the prisoner's counsel is a competent witness to prove the statements of the witness there made in order to contradict him. *Williams*, 91—599.

CONTENTS OF REJECTED PAPER NEED NOT BE GIVEN ON APPEAL.—Where a paper offered in evidence is excluded as being in itself incompetent, and its contents are not set out in the case on appeal, but it appears that counsel made known the substance of the paper when it was offered, the rule which requires that the case must show what the rejected evidence is, so that the court may pass upon the exception, is satisfied. Such ruling is analogous to the case of a witness excluded on account of his personal disability to testify, and without reference to the evidence he may give. *Pierce*, 91—606.

WHEN A PORTION OF A CONVERSATION HEARD IS ADMISSIBLE.—A witness may testify as to a portion of a conversation of defendant, though witness did not hear the entire conversation, if the portion heard embraces a distinct fact pertinent to the issue. *Carson*, 95—593.

When part of a conversation is elicited from the witness, the opposite party has a right to put the whole conversation in evidence. *Sheets*, 89—543.

WITHDRAWAL OF IMPROPER EVIDENCE FROM JURY, EFFECT OF.—Where improper evidence is received over defendant's objection, but before the conclusion of the trial the judge withdraws the evidence from the jury, instructing them that the evidence is inadmissible and that they must not consider it, there is no error. *Collins*, 93—564.

WHEN A WITNESS MAY BE IMPEACHED.—Before a witness can be examined to impeach another witness by proving inconsistent statements made by such witness, the impeached witness must be asked as to such statements, in order that he may have opportunity to explain them. *Wright*, 75—439.

A witness, on cross-examination, may be asked if he had not committed perjury in another state. *March*, 46 (1 *Jones*), 526.

EXPERTS.

See EVIDENCE.

EXPOSURE OF PERSON.

An indictment which charges an indecent and scandalous exposure of the naked person to *public view in a public place* is sufficient without charging the act to have been committed in the presence of one or more persons. Roper, 16 (1 D. & B.), 208.

EXTORTION.

ACT MUST BE UNDER COLOR OF TITLE.—An indictment against a justice of the peace for extortion must allege that the money was taken “under color of office.” Pritchard, 107—921.

QUESTION OF INTENT TO BE SUBMITTED TO JURY.—On a charge against a justice of the peace for extortion, the question of intent must be submitted to the jury, since to sustain the charge it is necessary to allege and prove that the fees were demanded wilfully and corruptly, and not through mistake of law or fact. Pritchard, 107—921.

ACT NOT CORRUPT, DEFENDANT ACQUITTED.—Where the verdict of the jury is that a register of deeds indicted for extortion took more than his legal fee for recording a deed, but did not take it *corruptly*, such finding is equivalent to a verdict of acquittal. Bright, 4 (Taylor's Term Rep.), 437.

OATH OF OFFICE NOT NECESSARY.—A justice of the peace who takes possession of his office and engages in the exercise of its duties is indictable for taking unlawful and extortionate fees under color of his office, though he has never taken the oath of office. Cansler, 75—442.

SHERIFF ENTITLED TO COST ON TAX-LIST ONLY AFTER SEIZURE OF PROPERTY.—A sheriff is not entitled to the fee of 50 cents for an execution against each taxpayer, after the tax-list is placed in his hands, but only becomes entitled to such fee, if at all, when he actually levies and seizes property in collection of the tax. Bisaner, 97—503.

VARIANCE.—Where an indictment for extortion charges that the act was done as tax collector, but the evidence shows that defendant was deputy sheriff and collected the taxes by virtue of that office, the variance is fatal. Bisaner, 97—503.

Also where the extortion charged is in collecting two dollars and thirteen cents as taxes, when only one dollar and sixty-three cents was due, and the evidence shows that defendant collected one dollar and sixty-three cents as taxes and fifty cents as costs, the variance is fatal. *Ib.*

INDICTMENT.—It is not necessary to state what the lawful fee is. Dickens, 2 (1 Hay.), 468.

The omission of the word “extorsively” in an indictment in the county court is not fatal. Dickens, 2 (1 Hay.), 468.

MISTAKE OR ADVICE NO EXCUSE.—It is no excuse, on indictment for extortion in taking more than the legal fee, that defendant did the act through mistake, or under improper advice. Dickens, 2 (1 Hay.), 468.

Where a board of county commissioners audited accounts in favor of its members for mileage, to which they were not entitled, under advice of counsel and without any corrupt or fraudulent motive, they are not indictable. Norris, 111—652.

EXTRADITION.

See also FUGITIVES.

RULES OF PRACTICE OF THE EXECUTIVE DEPARTMENT OF NORTH CAROLINA IN MAKING REQUISITIONS.

The application for the requisition must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:

(a.) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled, in Roman capital letters, for example: JOHN DOE.

(b.) That in his opinion the ends of public justice require that the alleged criminal be brought to this state for trial at the public expense.

(c.) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d.) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e.) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f.) If the fugitive is known to be under either civil or criminal arrest in the state or territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g.) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever,

and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(h.) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i.) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretenses, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required or a sufficient reason be given for the absence of such affidavit.

2. Proof by affidavit of *facts and circumstances* satisfying the executive that the alleged criminal has fled from the justice of the state, and is in the state on whose executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the state where the alleged crime was committed at the time of the commission thereof, and is found in the state upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the *facts and circumstances* showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a *magistrate* (a notary public is not a magistrate within the meaning of the statutes), and that a warrant has been issued and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions and of the officer who issued the warrant must be duly certified.

6. Upon the renewal of an application, for example: On the ground that the fugitive has fled to another state, not having been found in the state on which the first was granted, new or certified copies of papers in conformity with the above rules must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction, and sentence, upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

FORM OF REQUISITION.

STATE OF.....

The Governor of.....

To the Governor of.....

WHEREAS, It appears by.....which.....hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the laws of this....., that stand charged with the crime of which I certify to be crime under the laws of this, committed in the county of in this, and it having been represented to me that he has fled from the justice of this and may have taken refuge in the:

Now, therefore, pursuant to the provisions of the Constitution and the laws of the United States, in such case made and provided, I do hereby require that the said be apprehended and delivered to, who hereby authorized to receive and convey to the of, there to be dealt with according to law.

In witness whereof, I have hereunto signed my

name, and affixed theseal of the at

[L. S.] *the capitol in..... this day of.....
in the year of our Lord one thousand eight hundred
and*

By the Governor:

.....

FORM OF WARRANT.

STATE OF

The Governor of*To**And the sheriffs and under-sheriffs and other officers of and in the several counties of this*

WHEREAS, It has been represented to me by the Governor of that stand charged with the crime of which he certifies to be crime under the laws of said, committed in the county of in said, and ha.. taken refuge in the, and the said Governor of having, in pursuance of the Constitution and laws of the United States, demanded of me that I shall cause the said to be arrested and delivered to, who is duly authorized to receive into his custody and convey back to the said

And whereas, The said representation and demand is accompanied by whereby the said shown to have been duly charged with the said crime, and with having fled from said, and taken refuge in the, whichduly certified by the said Governor of be authentic and duly authenticated;

Therefore, You are required to arrest and secure the said wherever may be found within the and affordsuch opportunity to sue out a writ of *habeas corpus* as is prescribed by the laws of this, and to thereafter deliver into the custody of the said from which fled, pursuant to the said requisition; and also to return this warrant and make return to the Governor of within thirty days from the date hereof, of all your proceedings had thereunder, and of all facts and circumstances relating thereto.

In witness whereof, I have hereunto signed my name and affixed the seal of the, at the

[L. S.] capitol in, this day of, in the year of our Lord one thousand eight hundred and

By the Governor:

.....

AGENT'S AUTHORITY.

STATE OF

The Governor of*To all to whom these presents shall come:*

KNOW YE, That I have authorized and empowered, and by these

presents do authorize and empower to take and receive from the proper authorities of the fugitive from justice and convey to the of, there to be dealt with according to law.

In witness whereof, I have hereunto signed my name and affixed the seal of the, at the capitol in the this day of, in the year of our Lord one thousand and

By the Governor:

.....

FORM OF INDORSEMENT ON AGENT'S AUTHORITY.

I,, *do hereby certify*, that I have this day of 18.., honored the requisition of the Governor of, for the surrender of, fugitive from the justice of said last-named, and have issued a warrant for delivery to, the agent of said of whose authority to receive said fugitive is annexed hereto.

In witness whereof, I have hereunto signed my name and affixed the seal of the
 [L. S.] at the capitol in the this day of, in the year of our Lord one thousand eight hundred and

By the Governor:

.....

[NOTE.—The above RULES OF PRACTICE and FORMS were recommended by the INTERSTATE EXTRADITION CONFERENCE, held in the city of New York in 1887, and have been adopted by the State in conjunction with other States.]

A prisoner who voluntarily agrees to accompany an extradition agent, can not thereafter object to the absence of the warrant of extradition from the Governor of the State in which he was arrested. Cutshall, 109—764.

FAIRS.

Sec. 146 (2790). Fairs appointed by board of county commissioners. R. C., c. 47, s. 1.

The board of county commissioners, a majority being present, may appoint fairs in their respective counties, at such places as

they may judge most proper for the convenience of the inhabitants, so as to give encouragement to industry, by collecting the inhabitants for the purpose of bartering and selling all such articles as they may wish to dispose of.

Sec. 147 (2796). Violation of rules of society a misdemeanor. 1870-'1, c. 184, s. 4.

If any person, without license of the owner, or any agricultural or other society as aforesaid, shall unlawfully carry away, remove, destroy, mar, deface or injure anything animate or inanimate, while on exhibition on the grounds of any such society, or going to or returning from the same, he shall be guilty of a misdemeanor. It shall be sufficient in any indictment for any such offence, or for the larceny of any such thing, animate or inanimate as aforesaid, to charge that the thing so carried away, destroyed, marred, injured or feloniously stolen, is the property of the society to which the said thing shall be forwarded for exhibition.

FALSE IMPRISONMENT.

OFFICER.—A policeman who, without warrant, arrests a man found helplessly drunk in a public and much frequented place in the town, at 11 o'clock in the night, and takes him to the calaboose and locks him up until morning, and then goes before the mayor and obtains a warrant and immediately serves it by carrying the prosecutor before the mayor, where he is tried and convicted, is not guilty of false imprisonment. The law making it the officer's duty to obtain a warrant before making arrest, or, in cases where the arrest may be made without warrant, to take him at once before some tribunal, is not so unreasonable as to require him to do so at a late and unseasonable hour, besides a trial with the prosecutor in such a condition would have been a farce. *Distinguishing State v. Parker*, 75 N. C., 249, and *State v. James*, 78 N. C., 455. *Freeman*, 86—683.

Defendant, a constable, arrested the prosecutor on a warrant for bigamy, issued by a justice without any written affidavit, and put him in jail without having had any trial and having no mittimus; next day the prosecutor was brought out and a regular warrant issued on affidavit, and he was then regularly committed: *Held*, that defendant was guilty of false imprisonment. *James*, 78—455.

FRAUD PRACTICED IN INDUCING PROSECUTOR TO GO WITH DEFENDANTS.—Defendants called the prosecutor up out of his bed at night, represented to him, in changed voices, that they were in search of a stolen horse, and offered to pay him to accompany them; and thereupon he mounted behind one of the defendants on his horse, and went voluntarily, without threat or violence from defendants, and after riding a quarter of a mile in a gallop, he complained of being hurt from the riding, dismounted and then discovered that he was the victim of a hoax and was left in the road by defendants: *Held*, that the fraud practiced did not impress the transaction with the character of a criminal act. *Lunsford*, 81—528.

CHARGE—PUBLIC PLACE.—The prosecutor was drunk in an open space in rear of a bar-room, which fronted on one of the principal streets of a city, said open space being bounded on three sides by the bar-room, a two-story hotel, and a boarding-house overlooking the place where the prosecutor was found and arrested, which was about eight steps from the hotel dining-room. Some of the upper windows, and two of the dining-room and pastry-room windows of the hotel fronted the place, and the arrest was made while the guests, both of the hotel and boarding-house, were at dinner. Defendants were indicted for false imprisonment, and attempted to justify under a town ordinance against "public drunkenness": *Held*, that a charge that "if in order to view or see the prosecutor it was necessary for the citizens then and there assembled to go to the windows, then it would not be a public place" and defendants would be guilty, was erroneous. The ordinance says nothing about a public place, but is directed against "public drunkenness," and a man may be publicly drunk in a private place. *McNinch*, 87—567.

FALSE LIGHTS.

Sec. 148 (1024). False lights, holding out, on or near seashore. R. C., c. 34, s. 58. 1831, c. 42.

Any person who shall make or display, or cause to be made or displayed, any false light or beacon, on or near the sea-coast, for the purpose of deceiving or misleading masters of vessels, and thereby put them in danger of shipwreck, shall be guilty of a felony, and imprisoned in the penitentiary for not less than four months nor more than ten years.

FALSE MEASURES AND WEIGHTS.

See **MILLS**.

FALSE PRETENCE.

SEC. 151. False pretence and false token, cheating by.

SEC. 152. Obtaining signature by false pretence.

SEC. 153. Obtaining advances by false pretences.

SEC. 154. Advances obtained on false promise to begin work.

SEC. 155. Obtaining certificate of registration of cattle.

SEC. 156. Marriage license; misrepresentation as to age.

SEC. 157. Entering horse at fair under assumed name.

Sec. 151 (1025). False pretence and false token, cheating by. R. C., c. 34, s. 67. 1811, c. 814, s. 2. 24, 25 Vict., c. 96, s. 88. 33 Hen. VIII., c. 1, ss. 1, 2. 30 Geo. II., c. 24, s. 1. 52 Geo. III., c. 64, s. 1. 7 and 8, Geo. IV., c. 29, s. 53.

If any person shall knowingly and designedly, by means of any forged or counterfeited paper, in writing or in print, or by any false token, or other false pretence whatsoever, obtain from any person or corporation within the state any money, goods, property, or other thing of value, or any bank note, check or order for the payment of money, issued by, or drawn on, any bank or other society or corporation within this state or any of the United States, or on any treasury warrant, debenture, certificate of stock, or public security, or any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation of the same, such person shall be guilty of a misdemeanor for fraud and deceit, and imprisoned in the penitentiary not less than four months nor more than ten years, and fined in the discretion of the court: *Provided*, that if, on trial of any one indicted for such misdemeanor, it shall be proved that he obtained the property in such manner as to amount to larceny, he shall not, by reason thereof, be entitled to be acquitted of the misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts: *Provided further*, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.

INDICTMENT.—An indictment charging that defendant did “designedly, unlawfully and falsely pretend that a horse in his possession was sound

and healthy," is fatally defective. There is no averment of any false pretence, but only of a falsehood, or false affirmation, which is merely the expression of an opinion. Holmes, 82—607.

An indictment which alleges that defendant by means of a forged paper induced the prosecutor to execute to him a deed for 35 1-2 acres of land, instead of 55 1-2 acres, with intent to cheat and defraud the prosecutor out of "twenty acres of said tract of land of the value of twenty dollars," does not charge an indictable offence, since land is not concluded in the operation of the statute. Burrows, 33 (11 Ired.), 477.

An allegation that defendant did "unlawfully, etc., pretend that a certain mare which he * * * was proposing to trade * * * was sound in limb and body, and always had been sound in limb and body, whereas the said mare was broken down in her loins, and had been broken down in her loins," and that he knew these representations to be false, sufficiently charges the crime of false pretence. Sherrill, 95—663.

An indictment which alleges that defendant falsely represented that a mare which he exchanged for the prosecutor's mule was sound, and "that there had never been anything the matter with the eyes of the said mare," charges the false representation of a subsisting *fact*, and is sustained by proof that the eyes of the mare were diseased and had been operated upon for the "hooks" within the knowledge of defendant. Hefner, 84—751.

An indictment charging that defendant falsely pretended that he was the sole owner of a certain mule without averring that he was not the sole owner, is fatally defective. Pickett, 78—458.

Evidence that defendant sold prosecutor a pair of shoes for \$1.40 and received therefor \$1.50, and paid the ten cents change in two counterfeit half-dimes, will not support an indictment for obtaining money by false token. Allred, 84—749.

Where the false pretence alleged is that defendant falsely represented to the prosecutor that he had an order on the prosecutor from a third person for the delivery of goods, it is sufficient without an averment as to whether the order was oral or written. Mickle, 94—843.

An indictment which simply charges that defendant obtained "goods and money" of the prosecutor to the value of \$50 without giving the names usually applied to the goods, or stating the amount of money, is fatally defective. Reese, 83—637.

An indictment for obtaining a piece of ginger-bread from another by means of a counterfeit quarter of a dollar need not aver what sort of currency it was made to counterfeit, whether a United States, Spanish or Mexican quarter. Boon, 49 (4 Jones), 463.

Nor is it necessary, in such case, to aver that the false token was like a quarter of a dollar, or had so much the appearance of one as was calculated to deceive an ordinary person, since the word "counterfeit," *ex vi termini*, means a thing made to resemble some other thing. Ib.

Nor is it necessary to aver that defendant passed, or delivered the counterfeit quarter to the prosecutrix, since the averment that he obtained the ginger-bread by means of it necessarily imports that he passed it to her. Ib.

Nor is it necessary to aver that the ginger-bread was of any value, since it was an article of property and all property has some value. Ib.

The averment that defendant obtained the ginger-bread from the prosecutrix with an intent to defraud her is a sufficient allegation that it was her property. Ib.

It is not necessary that the indictment should use the word "feloniously." Crumpler, 90—701.

An indictment which alleges that defendant "designing and intending

to cheat and defraud C did unlawfully, knowingly and designedly falsely pretend that W did send him (the defendant) to C after the sum of five dollars in money, whereas in truth and in fact the said W did not send him * * * after the said sum of five dollars; by means of which false pretence he (the defendant) knowingly and designedly did, unlawfully and with intent to defraud, obtain from C" five dollars, sufficiently charges the crime of false pretence. Dixon, 101—741.

No averment of the value of the property obtained is necessary. Gillespie, 80—396.

An indictment charging that defendant represented a horse which he traded to the prosecutor "to be all right, whereas in truth and in fact he was not all right, but diseased to such an extent as to render him worthless," without averring in what manner he was not all right, is too vague and indefinite, and judgment should be arrested. Lambeth, 80—398.

An indictment which charges that defendant in swapping horses stated that his horse was sound, knowing that he was not sound, and that the prosecutor was induced thereby to trade, is sufficient. Mangum, 116—998.

Failure to use the word "feloniously" in the bill is fatal. Wilson, 116—979.

An indictment for obtaining goods by false pretences is fatally defective if the word "feloniously" is omitted. Bryan, 112—848. Caldwell, 112—854.

WHAT CONSTITUTES FALSE PRETENCE.—Defendant sold the prosecutor four barrels of crude turpentine, representing "that they were all right, just as good at bottom as they were at top," but when examined the barrels contained only a small quantity of turpentine on the top of each, the rest of the contents being chips and dirt: *Held*, that defendant was guilty of false pretences, and that the rule of *caveat emptor* did not apply. Jones 70—75.

A false representation that a mule "was sound, would work well and would not kick," made in connection with a proposition to sell the mule for a price, and made knowingly with intent to cheat and defraud, and by means of which the prosecutor was defrauded of his money, constitutes a false pretence within the meaning of the statute. Burke, 108—750.

An indictment for obtaining goods by false pretences can be maintained against one who sells land for a price by falsely representing it to be free from incumbrances and the title perfect, when the land is in fact encumbered with a mortgage known to defendant. It is not land that is obtained by the false pretence, but money, the price of the land. Distinguishing *State v. Burrows*, 11 Ired., 477. Munday, 78—460.

A false representation of a subsisting fact, calculated to deceive, intended to deceive, and which does deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another without compensation, is a false pretence and indictable. Phiifer, 65—321.

Obtaining burial clothes by falsely pretending that they were needed to bury a sister-in-law's child who has just died, is a false pretence within the statute, and it matters not whether the owner parted with his goods for gain or for a charitable purpose. Matthews, 91—635.

If a person by his acts or conduct induces another to believe that a fact is really in existence, when it is not, and thereby obtains money or property, he comes within the scope of the statute against false pretences. Matthews, 121—604.

To constitute this offence there must be a false representation of a *subsisting fact* intending to cheat and which does cheat. Mangum, 116—998.

To be indictable the false pretence must be of some existing fact in contradistinction from a mere promise or opinion; therefore, where defendant obtained a bottle of medicine from another by false representations that it was too strong to be applied on the face of such other he can not be held guilty of obtaining goods under false pretences. *Daniel*, 114—823.

The statute requires that the cheat should be accomplished by means of some token or contrivance calculated to impose on the credulity of ordinary men. *Simpson*, 10 (3 Hawks), 620.

The gist of this offence is the obtaining advances with the intent, existing at the time, not to commence work. Evidence merely of an agreement to work, the obtaining advances thereon, and the failure to comply, would not warrant a verdict of guilty. *Norman*, 110—484.

A statement upon which property is obtained, to come within the meaning of false pretence, must be false within the knowledge of the party making it, calculated and intended to deceive, and which did deceive, the person from whom the property was taken, and upon which such person reasonably relied at the time of the taking. *Moore*, 111—667.

There was evidence that the defendant obtained money from the deceased husband of the witness to get an electropoise which defendant, claiming to be an agent therefor, had agreed to sell to the husband, and which defendant claimed to be in the express office, when there was in fact no electropoise in such office, and defendant kept the money so obtained: *Held*, that the evidence was sufficient to be submitted to the jury. *Matthews*, 121—604.

WHAT DOES NOT CONSTITUTE THE OFFENCE.—It is not sufficient that the false representation was made after the property was obtained. *Moore*, 111—667.

A false representation that certain cotton is of the grade of "good middling" is not indictable, since the rule of *caveat emptor* applies. *Young*, 76—258.

The state's witness testified that "he went to the defendant and told him he understood defendant was an agent for one F, who would furnish good and lawful money to any one at the rate of \$10 for each \$1 invested, and that he afterwards, on the same day, made a bargain with defendant that upon the payment of \$21.50 the said K (defendant) was to procure for him from said F the sum of \$150; that defendant K told him he had furnished money at these rates for O. H. & Co.," and others. Witness further testified that said money had not been received by him: *Held*, that defendant was not guilty, since there was only a promise to be performed in the future, and not a false representation of a subsisting fact. *Knott*, 124.

On July 12, 1897, defendant certified in writing that he had received of F "twenty-four dollars in merchandise, the amount of my check for the quarter ending October 30, 1897, which check I hereby pledge in payment of same." He failed to apply the check or its proceeds: *Held*, that defendant was not guilty, since the fact that defendant did not have, and could not have, the check for the quarter from August 1st to October 30th was plain on the face of the writing, and was, or ought to have been known to the prosecutor. *Whidbee*, 124—.

If the prosecutor, knowing his note is in other hands than the payee's, pays him the money due, trusting him to make the application, he is not induced to part with it by any false pretense. *Moore*, 111—667.

FALSELY REPRESENTING A DEAD PAUPER AS ON THE POOR LIST.—Where it is proven that defendant falsely represented that a pauper placed on the "poor list" was a resident of the county, whereas in truth she was dead, each application for an order for her support made after her death, knowing she was dead, is evidence to be considered by the jury in deter-

mining defendant's intent, notwithstanding there is no evidence of fraud at the time the pauper was put on the "poor list." Wilkerson, 98—696.

CHARGE.—Defendant represented that a horse he was about to sell was sound and not lame, and upon the buyer's remarking that the horse limped, accounted for it as the result of a recent shoeing. It was shown that he knew the horse had a disease of long standing called the "sweeney," which was not perceptible, and that the lameness did not usually occur until after about three days' driving: *Held*, that it was proper to refuse to charge that the mere fact that the prosecutor perceived the lameness at the time of the trade entitled defendant to a verdict of not guilty. Wilkerson, 103—337.

Defendant was charged with obtaining goods by falsely representing that he owned a certain cow, which he mortgaged to the prosecutor, and afterwards refused to surrender, alleging it to be the property of his wife. It was in evidence that the wife sold the cow to a witness, but retained possession, and the witness told her that she might keep it by repaying the price; said witness in a subsequent transaction with the defendant husband received payment for the cow out of the husband's own funds, and surrendered an unregistered bill of sale, which was destroyed by defendant, who thereafter exercised control over the property. The court charged that the mortgage conveyed the legal title in the property to the prosecutor, who had the right to call for possession before the same was due, and that the transaction between the witness and defendant had the effect of putting the title back in the wife, and that defendant acquired no title thereby: *Held*, that such charge was not warranted by the evidence. Alphin, 84—745.

The omission to direct the attention of the jury to the fraudulent intent of the defendant as a necessary ingredient of the crime is error. Austin, 79—624.

Where the indictment alleges that defendant obtained money from the prosecutor on the representation that he owned certain bonds which were deposited with a third party, an instruction that the burden of proof is on defendant to produce the bonds or account for their absence to the satisfaction of the jury, is erroneous. Criticising *State v. Morrison*, 3 Dev., 299. Wilbourn, 87—529.

VARIANCE.—Where the indictment alleges a cheating in an executed contract, and the proof establishes an attempt to cheat in an executory contract which was abandoned before its consummation, the variance is fatal. Corbett, 46 (1 Jones), 264.

Where witnesses of the state testify to facts in accordance with the charge in the bill, it is no variance because a witness for defendant testifies to facts, which if believed, would make a variance. Mickle, 94—843.

EVIDENCE—OTHER SPECIFIC ACTS OF FRAUD.—Evidence that defendant had been guilty of another specific act of fraud wholly collateral to the issue before the jury can not be given by a witness called to support or impeach the character of defendant. Bullard, 100—486.

EVIDENCE OF THE LAW IN ANOTHER STATE.—The printed statute book of another state is not evidence to show what the law of that state is; it can only be shown by a copy authenticated by the seal of the state which enacted it. Twitty, 9 (2 Hawks), 441.

DEFECTIVE DESCRIPTION IN MORTGAGE.—A defective description in a mortgage of unplanted crops can not be aided by parol testimony. Garriss, 98—733.

DEFENDANT MAY SHOW THAT HE WAS ONLY A SURETY ON BOND.—A person charged with obtaining goods under false pretences may show that he was only a surety in the transaction, and executed the bond and mortgage with the principal with the understanding that the mortgage conveyed

only their joint property, though in its terms it conveys his individual property. The essence of the crime of false pretences being the intent to deceive and defraud, much latitude must be allowed in the reception of evidence bearing on this issue. *Garris*, 98—733.

PAROL EVIDENCE OF CONTENTS OF WRITTEN INSTRUMENT.—The rule that parol evidence of the contents of written instruments is not admissible until the loss of the instrument is proven or accounted for, does not apply to cases where the writing comes up on a collateral inquiry, and a party is not expected to be prepared to produce it, or where its possession is traced to the adverse party and he refuses to produce it. *Wilkerson*, 98—696.

EVIDENCE.—On indictment for obtaining money under false pretences by inducing the county treasurer to cash an order represented by the defendant as being genuine, evidence offered by defendant as to the stub-book kept by him in the register of deeds' office, which he claimed would show that the order was issued for a bill of stationery, was inadmissible because irrelevant and not corroborative of the evidence as to defendant's intent or tending to show that his representation as to the genuineness of the order was true. *Walton*, 114—783.

OTHER OFFENCES.—In order to show the *scienter* it is competent to prove other similar transactions by the defendant. *Walton*, 114—783.

CHARGE "MONEY," PROOF "GOODS."—The Code, section 957, authorizing such judgment as the record justifies, refers only to such matters as are necessarily of the record, as the pleadings, verdict and judgment, hence, where there are no exceptions on the trial, the fact that the indictment charged the defendant with obtaining "money" under false pretences, while the proof was that he obtained "goods," is not ground for reversal by the supreme court. *Ashford*, 120—583.

ARREST OF JUDGMENT.—The fact that the prosecutor was foreman of the grand jury and endorsed the bill of indictment, is not sufficient ground to support a motion in arrest of judgment. *Cannor*, 90—711.

A motion in arrest of judgment on the ground that the indictment alleged that the order for the support of the pauper was falsely obtained from the board of county commissioners, and that the county, not the board of commissioners, is the "person or corporation," can not be sustained, since the board is the county agent, and the county sues, or is sued, in their name. *Wilkerson*, 98—696.

Such county warrant is but evidence of a debt, and may be recalled. *Ib.*

SPECIAL VERDICT.—A special verdict which finds that the representation was false, but which fails to find the *intent* with which the statement was made, is fatally defective. *Blue*, 84—807.

A special verdict which fails to find whether defendant had the *intent* to defraud is defective. *Oakley*, 103—408.

VERDICT OF ACQUITTAL BY FRAUD.—A verdict of acquittal on an indictment for a misdemeanor procured by the trick or fraud of the defendant is a nullity, and the defendant can again be put on trial for the same offence. *Swepson*, 79—632.

MOTION TO QUASH.—It is error to quash an indictment charging that defendant "unlawfully and knowingly devising and intending to cheat and defraud, did then and there unlawfully, knowingly and designedly, falsely pretend to J. W. M. that a certain mule which he, the said J. M. B., proposed to trade to the said J. W. M., was sound and worked well and would not kick, whereas in truth and fact, mule was not sound, would not work well and would kick," etc. The false representations as to the qualities of the mule amount to something more than mere "tricks of trade," bluster and puffs, and the omission of the word "said" before the word "mule" is not fatal, as it is obviously implied from the connection. *Burke*, 108—750.

Sec. 152 (1026). False pretence; obtaining signature by. 1871-'2, c. 92

Every person who, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretence, obtain the signature of any person or persons to any written instrument, the false making of which would be punishable as forgery, or obtain from any person or persons any money, goods, wares, merchandise or other property or valuable thing whatsoever, shall be punishable by fine not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the penitentiary for a term not less than one year nor more than five years, or both, at the discretion of the court.

Sec. 153 (1027). False pretence; obtaining advances upon representation of ownership of property, and promising to apply the same to payment of the debt, and failing to do so. 1879, chapters 185, 186.

If any person shall obtain any advances in money, provisions, goods, wares or merchandise of any description, from any other person or corporation, upon any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel, or personal property, which said property, or the proceeds of which, the said owner in said representation thereby agrees to apply to the discharge of the debt so created as aforesaid, and the said owner shall fail to apply said produce or other property, or the proceeds thereof, in accordance with said agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property at the time such representation was made. This offence shall be punishable as in the preceding section.

Sec. 154. Advances obtained by false pretences. 1889, c. 444, 1891, c. 106.

If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description, from any other person or corporation upon or by color of any promise or agreement, that the person making the same will commence or begin any work or labor of any description for said person or corporation from whom said advances are obtained, and said person so making said promise or agreement shall unlawfully and willfully fail to commence and complete said work according to contract, without a lawful cause, the person so offending shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Where, upon a promise to begin work on the following Monday, the prosecutor makes advances to the defendant, and the latter fails, without proper excuse, to begin work at the time stipulated and is arrested on complaint of the prosecutor on Tuesday, this is a failure to begin work within the meaning of the statute. Norman, 110—484.

This statute is not unconstitutional. The offence is not the failure to comply with the contract, but the fraud in making it to obtain advances with intent to cheat and defraud. Norman, 110—484.

Sec. 155. False pretences; obtaining certificate of registration of cattle by. 1891, c. 94.

Every person who shall, by any false representation or pretence, with intent to defraud or cheat, obtain from any club, association, society or company for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal in the herd register or registers of any such association, society or company, or a transfer of any such registration, upon conviction thereof shall be punished by imprisonment in the county jail for a term not exceeding three months or a fine not exceeding one hundred dollars, or by both such fine and punishment.

Any person who shall, with intent to defraud or cheat, knowingly represents any animal for breeding purposes as being of greater degree of any particular strain of blood than such animal actually possesses, and by such representation obtains from any other person money or other thing of value shall be guilty of a misdemeanor, and upon conviction thereof shall for each offence be punished by a fine of not less than sixty dollars nor more than three hundred dollars or by imprisonment in the county jail for a term not exceeding six months.

Sec. 156. Marriage license; misrepresentation as to age. 1885, c. 346.

Any person who shall obtain a marriage license for the marriage of persons under lawful age by misrepresentation or false pretences, shall be deemed guilty of a misdemeanor, and upon conviction shall for each offence be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days, or both, at the discretion of the court.

Sec. 157, Unlawful to enter horse, etc., for competition at agricultural fair under assumed name. 1893, c. 387.

SECTION 1. It is hereby made unlawful for any person or persons knowingly to enter or cause to be entered for competition or to compete for any purse, prize, premium, stake or sweepstake offered or given by any agricultural or other society, association or person in this state any horse, mare, gelding, colt or filly under an assumed name or out of its proper class. Any person found

guilty of a violation of the provisions of this section shall be punished by fine of not less than two hundred nor more than one thousand dollars, or imprisonment in the penitentiary for not less than one or more than five years, or both fine and imprisonment, at the discretion of the court.

FELONY.

Sec. 158. Felony, definition of. 1891, c. 205.

A felony is a crime which is or may be punishable by either death or imprisonment in a state prison. Any other crime is a misdemeanor.

Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime.

The provisions of this act shall not apply to any crime which shall have been committed prior to the ratification of this act.

THE WORD FELONIOUSLY MUST BE USED.—An indictment for a crime punishable by death or imprisonment in the penitentiary which fails to allege that the act was "feloniously" committed, is defective. Skidmore, 109—.

In such case, however, it is error to quash the bill, the proper course being to hold the prisoner and permit the solicitor to send another bill. Skidmore, 109—.

Where there are two counts in an indictment, each charging a felony, a general verdict is good without specifying upon which count it was rendered. Carter, 113—639.

The joinder in an indictment of a count for a lesser offence, or for an attempt to commit the same, is mere surplusage. Brown, 113—645.

A defendant charged as principal in an indictment for assault with intent to kill can not be convicted as accessory. Green, 119—899.

FEMALE CONVICTS.

Sec. 159. Female convicts not to be worked on roads or chain gang. 1897, c. 270.

SECTION 1. It shall be unlawful for any court or officer, either judicial, executive or ministerial, to order or require the working of any females on the streets or roads in any group or chain gang in this state, and any officer or person violating the provisions of this act shall be deemed guilty of a misdemeanor.

FENCES.

See STOCK LAW AND FENCES.

FERRIES.

See ROADS.

FISH AND FISHERIES.

Sec. 160 (3379). Non-residents forbidden to fish for profit in waters of the state; sales, etc. R. C., c. 81, s. 5. 1844, c. 40, s. 1. 1876-'7, c. 33. 1883, c. 171.

No person shall use or cause to be used, in any of the navigable waters of the state, any weir, hedge, net, or seine, for the purpose of taking fish for sale or exportation, or any tongs or drags for the purpose of taking oysters, unless he shall have resided continuously in the state at least twelve months next preceding the day on which he shall begin to take fish or oysters: nor shall any person assist in using, or be interested in using or causing to be used, in any such waters for the purpose aforesaid, any weir, hedge, net, seine, tongs or drags in the use of which any such non-resident person may have an interest: *Provided*, Nothing herein shall prevent any person from fishing with seines hauled to the shore at any fishery, the title to which fishery or any interest therein may have been acquired by such person by purchase or inheritance: *Provided, further*, This section shall not extend to servants employed to fish by any person allowed to fish in the navigable waters of the state: *Provided, also*, no non-resident of the state shall make any sale, assignment or transfer of any fishery, weir, or other fishing apparatus, or privilege mentioned in said section, to any citizen of the state for the purpose of operating and working said fishery, weir, or other fishing apparatus as aforesaid, under the name and ownership of such citizen, or as the servant or employee of any citizen, and any sale, transfer or assignment not made *bona fide* and for a full consideration, shall be null and void. Upon affidavit founded

upon information and belief that any non-resident of the state is operating any such fishery, weir, or other fishing apparatus as aforesaid in the waters of the state, under such sale, assignment or transfer as the pretended servant or employee of any citizen of the state, it shall be the duty of the justice of the peace, before whom said affidavit is made, to issue a warrant, against the said non-resident and citizen under whose name said fishery is operated, and upon conviction the said offenders shall be guilty of a misdemeanor, and shall, for every offence, be fined not more than fifty dollars, or imprisoned not more than thirty days. Upon the said trial, the burden of proof shall be on the defendants to prove the *bona fides* and full consideration of said sale or transfer.

Sec. 161 (3380). Penalty therefor. R. C., c. 81, s. 6. 1844. c. 40, s. 2.

Any person who shall violate the preceding section, shall, for every offence, forfeit one hundred dollars; one-half to the use of the person suing for the same, and the other half to the common school fund of the county where the offence is committed.

NON-RESIDENT EMPLOYEE OF RESIDENT.—Non-residents who are *bona fide* the servants or employees of a resident of this State, and who use their employer's tongs or drags to take oysters for him from the navigable waters of this state, can not be convicted under this section. Conner, 107—931.

Sec. 162 (3384). Right to establish fisheries, prior right; platforms, and penalty for damaging them. 1874-'5, c. 183, ss. 1, 2, 3, 4, 5, 6.

Whenever any person shall acquire title to lands covered by navigable water under the chapter entitled "Entries and Grants," the owner, or person, so acquiring title shall have the right to establish fisheries upon said lands; and whenever the owners of such lands shall improve the same by clearing off and cutting therefrom logs, roots, stumps or other obstructions, so that the said land may be used for the purpose of drawing or hauling nets or seines thereon for the purpose of taking or catching fish, then and in that case the person who makes or causes to be made the said improvements, his heirs and assigns, shall have prior right to the use of the land so improved, in drawing, hauling, drifting or setting nets or seines thereon, and it shall be unlawful for any person, without the consent of such owner, to draw or haul nets or seines upon the land so improved by the owner thereof for the purpose of drawing or hauling nets or seines thereon; and this section shall apply where the owner of such lands shall erect platforms or structures of any kind thereon to be used in fishing with nets and seines; and every person who shall willfully destroy or injure the said platform or structure, or shall interfere with or molest the owner in the use of such lands as aforesaid, or in any

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other manner shall violate this section, shall be guilty of a misdemeanor: *Provided*, this section shall not be so construed as to relieve any person from punishment for the obstruction of navigation.

Sec. 163 (3385). Masters of vessels wantonly injuring seines or nets, penalty on. R. C., c. 81, s. 9. 1848, c. 61, ss. 1, 2.

Any master or other person having the management or control of a vessel or boat of any kind, in the navigable waters of the state, who shall willfully, wantonly, and unnecessarily do injury to any seine or net, which may be lawfully hauled, set or fixed in said waters for the purpose of taking fish, shall forfeit and pay to the owner of such seine or net, or other person injured by such act, one hundred dollars.

FORCIBLE ENTRY AND DETAINER.

See also ENTERING ANOTHER'S LANDS.

Sec. 164 (1028). Forcible entry and detainer. R. C., c. 49, s. 1. 5 Rich. II., c. 8.

No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hands nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor.

WHAT CONSTITUTES THE OFFENCE.—Defendant came to the house of the prosecutrix cursing and swearing and threatening to kill her; she did not forbid him to enter because she was afraid, and she and several others who were in the house all fled on his approach after fastening the door. Defendant kicked down the door and entered, knocked over the furniture and made a great noise: *Held*, that defendant was guilty of forcible entry. Jacobs, 94—950.

The prosecutor occupied, with his family, a separate and distinct dwelling, several hundred yards from defendant's house, but on defendant's plantation, under a contract by which, for his services as a laborer, he was to have furnished him a dwelling-place and a monthly allowance of meal and meat, as well as the privilege of cultivating a small strip of land for his own benefit. Defendant, by threats and demonstrations of deadly weapons and an array of numbers against which resistance would have been useless, drove the prosecutor out of the house: *Held*, that the relation of lessor and lessee existed between the parties, and the defendant and those aiding him were guilty of forcible entry. *Distinguishing* State v. Curtis, 4 D. & B., 222. Smith, 100—466.

When the prosecutrix was temporarily absent, leaving her daughter-in-law in the house, the defendant entered by pushing open the door, and began to throw the furniture belonging to prosecutrix out of the house, leaving that of the daughter-in-law undisturbed at her request. On the return of the prosecutrix she attempted to re-enter, but was prevented by defendant who stood in the door armed with an axe swearing she should not enter. They had been some controversy between the parties as to the ownership of the house, but it had been occupied by the prosecutrix as her dwelling about three months: *Held*, that the prosecutrix, having left the house only for a temporary purpose, was, in contemplation of law, still in possession, and that defendant was guilty of forcible entry. *Shepard*, 82—614.

Where a man of superior strength goes to the dwelling-house of another who is absent at the time of his arrival, and remains there against the will of the wife, wrangling with her and using insulting language, and then the husband returns and he still remains in the house, though ordered out, and then goes into the yard with a club in his hand, cursing and making threats, he is guilty of a forcible entry and detainer. *Caldwell*, 47 (2 Jones), 468.

Five defendants entered and took possession of a blacksmith shop which the prosecutor had rented from one of defendants, but, the prosecutor's term having expired, he had, without surrendering possession, leased from another person who was a co-tenant with the defendant from whom he first rented. While the prosecutor was about one hundred yards from the shop this defendant demanded the key of him, and being refused, indicated his purpose to open by force, when the prosecutor forbade it. Defendants then broke open the shop and took possession. While defendants were at the shop the prosecutor's son was there. The prosecutor went within seventy-five yards of the shop, and testified that he was not afraid of defendants, but did not go to the shop because he feared it might lead to a difficulty: *Held*, that defendants were guilty of forcible entry. *Distinguishing State v. Mills*, 104—905. *Davis*, 109—.

Where a tenant in possession, through intimidation or indifference, did not forbid the entry of parties taking possession, and the landlord learning of the entry, went the same day and ordered them off, and they refused to go, and plowed up the land, the entry became forcible after being forbidden, if not so at the beginning. *Robbins*, 123—730.

WHAT DOES NOT CONSTITUTE THE OFFENCE.—The prosecutor had possession of a house consisting of the main building with several rooms and a shed attached, and locked the door of the shed in which he had some tools, and leaving a tenant in possession, he went away intending to return; but afterwards the tenant admitted defendant into peaceable possession of the main building: *Held*, that defendant was not indictable for a forcible entry in breaking into the shed and assuming possession of that, since when he took possession of the main building he had possession of the whole tenement, and could not be guilty of successive forcible entries in going from one room into another. *Prigden*, 30 (8 Ired.), 84.

Defendant, in company with an old negro man, went to a house then in possession of the prosecutor, he being present, and said, "This is my house and I mean to take possession of it." The prosecutor forbade him to enter, but he did enter, using no force and making no demonstration of violence, and thereupon the prosecutor, to avoid a difficulty, went away: *Held*, that defendant was not guilty of forcible entry. *Mills*, 104—905.

A forcible detainer is not indictable where the entry is peaceable, and from a verdict that defendant "*unlawfully*" and with a strong hand detained," it can not be implied that the entry was also unlawful. *Godsey*, 35 (13 Ired.), 348.

The owner of a house which is occupied by his servant or steward is

not indictable for entering and expelling the servant or steward when no injury is done to the person or other breach of the peace, since the possession of a servant is the possession of the master. *Curtis*, 20 (4 D. & B.), 222.

NOT NECESSARY TO BE PUT IN FEAR.—It is not necessary that the party shall be actually put in fear, but it is sufficient if there is such demonstration of force as to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace. The demonstration of force may be by numbers or weapons. *Lawson*, 123—740.

LANDLORD MAY INDICT.—While the possession is *sub modo* in the tenant, yet it remains in the landlord certainly to the extent that he can warn off trespassers and intruders. *Robbins*, 123—730.

FORMER ACQUITTAL.—A plea of former acquittal is sustained by proof of an acquittal on an indictment for forcible trespass for this same transaction in respect to the same land. *Lawson*, 123—740.

INDICTMENT.—An indictment which alleges that the prosecutor was "then and there in the peaceable possession," and was then and there "violently, forcibly and with a strong hand expelled, removed and put out of the said messuage," sufficiently avers the *personal presence* of the prosecutor at the time of the entry and detainer. *Eason*, 70—88.

A indictment which charges that the prosecutor was "seized in his demesne as of fee" of land does not sufficiently charge the actual possession of the prosecutor. *Bryant*, 103—436.

An indictment for a forcible entry into "the house of John Bell, Mary Bell being then and there present and forbidding the same," is fatally defective for want of an averment that it was the house of John Bell, or that Mary Bell was in possession, that she was a member of John Bell's family, or had any right to forbid the entry. *Morgan*, 60 (*Winst. Law*), 246.

An indictment for forcible entry into a dwelling-house need not allege that the proprietor was in the house. *Fort*, 20 (4 D. & B.), 193.

Where the transaction, alleged in different counts, was one and the same, the possession in one county being stated as the possession of the landlord, and in the other the possession being stated as that of the tenant, the two counts were not repugnant, but were a mere statement of the same transaction to meet the different phases of proof; and the court properly refused to quash, or to require the solicitor to elect, or to arrest the judgment. *Robbins*, 123—730.

FORCIBLE TRESPASS.

WHAT CONSTITUTES THE OFFENCE.—Although the entry be peaceable, yet if, after entering, defendant, on being ordered to leave, uses violent language and pursues the occupant to his house, he is guilty. *Talbot*. 97—494.

NUMBER OF DEFENDANTS SUFFICIENT THOUGH NO FORCE USED.—Where three persons enter a field in the possession of another and gather the growing corn, the possessor being present and forbidding them, their number makes it indictable, though no force is used. *Simpson*, 14 (3 Dev.), 504.

WHEN MALICE OR UNLAWFUL INTENT NECESSARY.—Where a person is illegally evicted from his premises by the sheriff by virtue of a proceeding

before a magistrate under the landlord and tenant act, the plaintiff in the action, who was present at the eviction but gave no aid, is not indictable for a forcible trespass, though the proceeding before the justice was irregular, unless it be shown that he acted maliciously, or with intent to procure an illegal eviction. *Ferguson*, 67—219.

PROSECUTOR'S ACTS NOTICE OF RESISTANCE WITHOUT FORBIDDING.—Where one who is not on friendly terms with the owner of a dwelling-house, comes there armed with a knife, a gun and a revolver, and immediately after entering uses violent and threatening language, the owner, being present, and on being forcibly ejected by an inmate of the house, again comes to the outer door and forces it open, against the owner who is struggling to keep it closed, he is guilty of a forcible trespass, though the owner may not have forbid him from entering, since the owner's acts were sufficient to show defendant that his entry was resisted. *Bordeaux*, 47 (2 Jones), 241.

DEFENDANT GUILTY IF HIS ACTS WERE CALCULATED TO INTIMIDATE.—Defendant, while on his horse, and on the premises of the prosecutor, procured possession of a due bill of the lady of the house by asking to see it; he then put it in his pocket asserting his intention not to pay it, and when she demanded it back "he began using rough language to her and she did not attempt to take it back from him because she was afraid." When she sent one of the children to call her husband defendant rode off taking the paper with him: *Held*, that defendant was guilty of forcible trespass. Distinguishing *State v. King*, 74—177, in that in King's case there was nothing calculated to intimidate or put in fear. *Gray*, 109—.

CAN NOT BREAK OPEN DOOR IN CIVIL CASE—EXCEPTION.—An officer can not break open the door in a house and enter therein, without the consent of the owner, for the purpose of executing civil process, except in cases of claim and delivery. Following *State v. Armfield*, 2 Hawks, 246. *Whitaker*, 107—802.

Where an officer, in serving civil process, forces an entrance through a door partly closed by those within who are resisting the entrance, he is guilty of forcible trespass. *Armfield*, 9 (2 Hawks), 246.

An indictment for forcibly and carrying away property out of the possession of one may be sustained, although it may have been done at the command of the person who had the real title to the property. *Joseph*, 2 (Hay.), 18.

The evidence was that the prosecutor's mill was placed on land leased by the defendant, with the consent and under contract with the latter that the defendant was to furnish logs to be sawed by the prosecutor at a specified price; that the defendant and his laborers destroyed the mill in the presence of the prosecutor, who protested against it; that no notice had been given to the prosecutor of defendant's intention to remove the mill, and that defendant, when asked why he did not let the prosecutor know that he was going to tear down the mill, said: "It would not have done," the owner "was in possession and would have been bad to get out:" *Held*, that it was proper to leave to the jury the question whether the defendant was guilty after determining in whom was the possession. *Woodward*, 119—836.

Defendants went upon the prosecutor's premises and demanded certain machinery in his possession, which was refused; the next morning they began to take down the machinery in the prosecutor's absence, but about an hour afterwards he came and ordered them to stop, whereupon one of them assaulted him. They continued the work until stopped by an officer: *Held*, that the judge properly left to the determination of the jury the question as to who was in possession and instructed them that if defendants were in possession they should be acquitted, otherwise they were guilty. *Webster*, 121—586.

Though the entry on land is peaceable, and even by permission of the owner, yet if, after getting on the premises, the defendant uses violent and abusive language and does acts calculated to intimidate, he is guilty. Gray, 109—.

PUBLIC HIGHWAY.—Where defendants ride to and fro along the public highway, shouting and cursing and using violent and menacing language, stopping in front of the prosecutor's house, and in his presence, he owning the land on both sides of the road, they are guilty of a forcible trespass. Widenhouse, 71—279.

TAKING PROPERTY IN PROSECUTOR'S ABSENCE AFTER HAVING BEEN FORBIDDEN.—Where the defendants go to the house of the prosecutor, and one of them claims a cow, asserting his purpose to carry the cow away, which is then in possession of and claimed by the prosecutor, who protests against the defendants taking the cow, and while the latter goes to a neighbor's to procure evidence to prove his title, the defendants drive the cow off, they are guilty of a forcible trespass. McAdden, 71—207.

Defendant rode into the yard of the prosecutrix after being forbidden to enter by her, and asked where her husband was. On being told that he knew, he replied, "Yes, d—n him, I have sent him to jail, and I intend to send him to the penitentiary," and that he had come to give her a d—n cursing. He did curse her, and remained until she told him again to leave, and that if he did not she would call Mr. D., when he turned and rode off: *Held*, that defendant was guilty of forcible trespass. Hinson, 83—640.

POSSESSION OF THE SON THAT OF THE FATHER.—Where three men break open the prosecutor's crib and take and carry his corn therefrom, his son being present and forbidding them, they are guilty of forcible trespass, and the taking may be averred to be from the possession of the prosecutor. Drake, 60 (Winst. Law), 241.

PUBLIC ROAD.—The use of violent and threatening language by three armed persons in front of the prosecutor's gate makes them guilty of a forcible trespass, and the fact that they were in the public road is no excuse. Buckner, 61 (Phil. Law), 558.

NOT NECESSARY THAT PROSECUTOR SHOULD BE PUT IN FEAR.—It is not necessary that the person from whom the property was taken should have been actually *put in fear*. Pearman, 61 (Phil. Law), 371.

ENTRY FORCIBLE WHEN TERROR CAUSED EITHER BY SPEECH OR BEHAVIOR.—Where a person entering on land in possession of another, either by his behavior or speech gives those who are in possession just cause to fear that he will do them some bodily harm if they do not give way to him, his entry is esteemed forcible, whether he caused the terror by carrying with him such an unusual number of attendants, or by arming himself in such a manner as plainly to intimate a design to back his pretensions by force, or by actual threatening to kill, maim or beat those who continue in possession, or by making use of expressions plainly implying a purpose of using force against those who make resistance. Pollok, 26 (4 Ired.), 305.

NUMBERS—INSULTING ACT.—Where four persons enter the yard of a woman with a common intent to abet each other in injuring and insulting her, and actually insult her with abusive language and gestures and by thrusting through her broken door the carcass of a dead animal, and refuse to go away when bidden to do so, they are guilty of a forcible trespass. Tolever, 27 (5 Ired.), 452.

JUSTIFYING UNDER PROCEEDING IN EJECTMENT AFTER ACT AUTHORIZING IT REPEALED.—When four persons go upon premises in the actual possession of another, and eject him and his family from the house they are occupying and carry their effects into the woods, they are guilty of forcible trespass, and can not justify under a proceeding before a justice of the peace,

based on Rev. Code, c. 49, s. 2, authorizing proceedings before a magistrate for the ejectment of persons guilty of forcible entry and detainer, when the offence is committed after the repeal of said chapter of the Rev. Code. *Yarborough*, 70—250.

WHAT DOES NOT CONSTITUTE THE OFFENCE.—Defendant purchased goods at the prosecutor's store, promising to pay cash for them, but took the goods to his horse which was hitched about five paces from the store, and then returned to the store, took some money out of his pocket, and then told the prosecutor that he had an order on him for the goods from another person which must be taken. The prosecutor replied that he could not accept the order, that he had been promised the cash, and must have it. The defendant turned and mounted his horse, the prosecutor following and telling him not to take off the goods until he had paid for them, when the defendant throwing down the order as he rode off, looked back at the prosecutor and said with an oath, "I have got the goods; help yourself if you can." No other person was present, and there was no other demonstration of force: *Held*, that defendant was not guilty of forcible trespass, since there was no such demonstration of force as was calculated to intimidate or put in fear. *King*, 74—177.

DEFENDANT NOT GUILTY WHEN ORDINARY FIRMNESS WOULD BE SUFFICIENT.—Defendant, after having rented a field of the prosecutors, abandoned his crop in July, and thereupon the prosecutors took possession, but at fodder pulling time, while both the prosecutors were in the field, defendant came back and said: "Boys, the fodder is ripe; I am going to pull it and have it, or die." The prosecutors then told him it was not his, and that they would get protection, but defendant answered he did not care for sheriffs, law or anything else, and pulled and hauled the fodder away the same day: *Held*, that defendant was not guilty of forcible trespass, since the alleged trespass was committed by only one unarmed person on the actual possession of two, and the law will not allow its aid to be invoked by indictment for rudeness of language, or even slight demonstrations of force, against which ordinary firmness would be a sufficient protection. *Covington*, 70—71.

OFFICERS—EJECTMENT UNDER IRREGULAR JUDGMENT.—A sheriff and his assistants indicted for forcible trespass in turning the prosecutor out of his house, may justify under an execution issued by a justice in a proceeding under the landlord and tenant act, when there is nothing on the face of the process to inform the sheriff that the justice had acted irregularly though the proceeding was in fact irregular, since if it appears that the Court has jurisdiction of the subject-matter under proper circumstances, the sheriff is not bound to look beyond his execution. *Ferguson*, 67—219.

SEIZING PROPERTY UNDER EXECUTION.—A sheriff is not indictable for seizing property under an execution in the possession of and belonging to a son of the defendant in the execution when he acts *bona fide* under a bond of indemnity. *Tatom*, 69—35.

An officer who seizes property under lawful process is not guilty of forcible trespass, though he states at the time that he seizes it as the property of his father, and does not show his execution until after a quarrel has ensued. *Elrod*, 28 (6 Ired.), 250.

An officer can not decide whether a warrant is issued properly, but he must, at his peril, determine whether he who issued it had jurisdiction of the matter. *McDonald*, 14 (3 Dev.), 469.

The prosecutor and defendants cultivated distinct portions of a field surrounded by a common fence, the prosecutor planting corn and the defendant cotton. The prosecutor, on going to the field one day, found defendants cutting down the corn with hoes; he forbade them, but they continued, and the prosecutor then left without making any effort to stop them: *Held*, that an indictment for forcible trespass could not be sus-

tained, since the entrance was made in the absence of the prosecutor, but defendants might be convicted of a forcible detainer. *Laney*, 81—535.

Rails when made up into a fence upon land become a part of the realty, and an indictment for a forcible trespass to personal property in taking and carrying them away by one continuous act, can not be supported. *Graves*, 75—396.

It appeared that defendant purchased the lease of a stone quarry from B, the lessee, and entered into possession and began to work it; that thereafter B acquired the fee-simple title to the quarry, and in the interval between working hours, and while defendant was absent, entered and moved out defendant's things from the quarry. The next morning defendant with several employees, with show of force, but without breach of the peace, went to the quarry and entered: *Held*, that it was error to refuse to charge that if defendant entered into possession under a contract of sale of B's interest, and afterwards B purchased the fee and entered in the night time, and when defendant came to work the next day he was forbidden to enter, defendant's entry, under such circumstances, would not be forcible trespass, defendant being in possession of the land. *Childs*, 119—858.

One can not be guilty of forcible trespass where the owner of the land is not in actual use and enjoyment of the same, using it for such purposes as it is capable of; and, therefore, an instruction defining possession as "exercising such control and authority over it (the land) as allows him to use it if he chooses" is erroneous, since such language imparts only a constructive possession. *Newbury*, 122—1077.

ABUSIVE LANGUAGE USED IN THE STREET.—Defendant stopped his wagon in the middle of the street in front of the prosecutor's house and lot in a city and called for the prosecutor, and when he came to the gate began to curse him, called him a liar and accused him of endeavoring to cheat. The prosecutor's wife also came out to the gate when he ordered defendant to leave, to which he replied that he would leave when he got ready, and called the prosecutor a "damned rascal." The wife then told him to leave, when he again said he would leave when he got ready, and continued to use insulting, violent and menacing language. The prosecutor finally told him to leave or he would get his gun and shoot him, in reply to which he dared the prosecutor into the street, and after remaining some ten or fifteen minutes drove off: *Held*, that these facts do not constitute forcible trespass. *Lloyd*, 85—573.

TAKING UNDER TOWN CHARTER.—A town charter authorized the taking of private property for public streets, and provided that in case of disagreement between the owner of the condemned land and the commissioners as to the damages, the matter should be referred to arbitrators, and the damages agreed on or awarded were directed to be paid "as other town liabilities, by taxation:" *Held*, that such charter was valid, and that officers of the town who seized the property of a private owner by virtue of an order for its condemnation for a street were not guilty of a forcible trespass, if they used no more than necessary force, though the owner had not been paid, and was present and forbidding. *Lyle*, 100—497.

TENANT IN COMMON.—A tenant in common of a bale of cotton is not indictable for keeping possession of it by force against his co-tenant. *Marsh*, 64—378.

ARREST OF JUDGMENT.—After conviction of forcible trespass, judgment can not be arrested because there is no allegation as to the time when the offence was committed. *Caudle*, 63—30.

VARIANCE.—Where the indictment charges that the prosecutor was present forbidding the entry, but the jury find that he was not present, but his family was, the variance is fatal, since though the possession of

the family was his possession, and the indictment might have alleged the possession to be in him, and the entry to have been made in the presence of his family, yet their *presence* could not be construed to be his presence. Walker, 32 (10 Ired.), 234.

An indictment charging the taking of a slain deer is not supported by evidence of the forcible taking of a deerskin severed from the body of the deer. Hemphill, 20 (3 D. & B.), 109.

TITLE GIVES POSSESSION.—If two are in the same house the law adjudges the possession in him who has title, but not so as, by relation back, to make the other guilty of a forcible trespass when the entry was without force. McCanless, 31 (9 Ired.), 375.

PROSECUTOR MUST BE PRESENT—TITLE NOT IN QUESTION.—The gist of the offence of forcible trespass is a high-handed invasion of the possession of another, *he being present*; title is not drawn in question. McCanless, 31 (9 Ired.), 375.

MUST BE FORCE CALCULATED TO INTIMIDATE.—To constitute forcible trespass there must be a demonstration of force, as with weapons or a multitude of people, so as to involve a breach of the peace, or directly tend to it, and be calculated to intimidate or put in fear. Ray, 32 (Ired.), 39.

DISTINCTION BETWEEN FORCIBLE DETAINER AND TRESPASS.—The only distinction between forcible trespass and forcible entry and detainer is that the former is as to personal property, and the latter as to realty. Lawson, 123—740.

TITLE NOR RIGHT OF POSSESSION.—On indictment for a riot and forcible trespass in entering a man's dwelling house, he being in the actual possession thereof, and taking from his possession certain personal property, it is not necessary to show that the prosecutor had the right to the property, or the right to the possession, but whether he had in fact the *possession* thereof at the time when that possession was charged to have been invaded with such lawless violence, and any evidence tending to establish that possession is admissible. Bennett, 20 (4 D. & B.), 43.

INDICTMENT.—It is not necessary to allege in the bill of indictment that the prosecutor at any time forbade the entry of the defendants, or that he was put in fear, and then failed to forbid such entry by reason of the great numbers or by the force manifested. Austin, 121—620.

GIST OF THE OFFENCE.—The gist of the offence of criminal forcible trespass is that there be such an offer of violence or demonstration of force as is calculated to bring about a breach of the peace, and this may be implied, even if there be no actual violence or fear inspired by those committing the trespass, if the person whose possession is invaded be present at any time during the commission of the act and forbidding it. Woodward, 119—836.

FORGERY.

SEC. 165. Forgery, how punished.

SEC. 166. Forgery and counterfeiting bank-notes, etc.

SEC. 167. Uttering forged notes, bills, etc.

SEC. 168. Forgery and counterfeiting certificates of stock by officer or agent of corporation.

SEC. 169. Judgments, bonds and other securities, endorsing and selling.

SEC. 170. Forgery of names to petitions.

SEC. 171. Forgery and counterfeiting coin.

SEC. 172. Possession of instruments for counterfeiting foreign coin.

SEC. 173. Fraudulently connecting different parts of genuine instruments.

SEC. 174. Forgery and counterfeiting private marks, stamps or labels.

SEC. 175. Selling merchandise with forged or counterfeited marks, stamps or labels.

SEC. 176. Fraudulent use of brands.

SEC. 165 (1029). Forgery, how punished. R. C., c. 34, s. 59. 1801. c. 572. 5 Eliz., c. 14, ss. 2, 3, etc. 21 Jac. 1, c. 26 (A. D. 1623).

If any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to be forged or made, or shall show forth in evidence, knowing the same to be forged, any deed, lease or will, or any bond, writing obligatory, bill of exchange, promissory note, indorsement or assignment thereof; or any acquittance, or receipt for money or goods; or any receipt, or release for any bond, note, bill, or any other security for the payment of money; or any order for the payment of money or delivery of goods, with intent, in any of said instances, to defraud any person or corporation, and thereof shall be duly convicted, the person so offending shall be punished by imprisonment in the penitentiary or county jail not less than four months nor more than ten years, and fined in the discretion of the court.

PAPERS NOT THE SUBJECTS OF FORGERY.—A prosecution bond given by a husband to his wife in an action against her for divorce cannot be the subject of forgery, since the husband is liable for her costs until the divorce is obtained, and the bond is binding on no one. Lytle, 64—255.

Falsely putting a witness' name to a bond which is not required to have a subscribing witness does not vitiate the bond, and is not forgery. Gherkin, 29 (7 Ired.), 206.

Defendant was indicted for the forgery of the following order: "Mr. M., please send me 3 gals. whiskey I will send you money. Dec. the 24th, 1888. D. S." Held, that though the order was not such a one as is the subject of forgery under the statute, yet the indictment was good for misdemeanor at common law. Hall, 108—776.

Falsely, wittingly and corruptly rubbing out, erasing or obliterating a release or acquittal on the back of a note or bond is not forgery. Thornburg, 28 (6 Ired.), 79.

NOT NECESSARY TO SHOW THAT THE ORDER WAS FILLED.—On indictment for the forgery of an order for whiskey, addressed to one member of a firm, it is immaterial whether the member of the firm addressed, or his

partner, filled the order, or whether the order was filled at all or not. Hall, 108—776.

MISDEMEANOR AT COMMON LAW.—The forgery of the following order, "Mr. Miller, please send me 3 gals. whiskey I will send you money. D. S. Dec. 24th, 1888," is a misdemeanor at common law, and an indictment therefor may be sustained independent of the statute. Hall, 108—776.

INDICTMENT.—An indictment which charges that defendant did forge a certain paper-writing, commonly called a railroad pass, as follows: "Hillsboro, N. C., Oct. 17th, 1885—Conductor will please pass this man to Graham and return, J. B. Rosemond," is fatally defective. The indictment should charge that Rosemond had authority from the railroad company to issue such a pass, and that it was presented to the conductor, who was the agent of the company and authorized and required to receive it. Weaver, 94—836.

Defendant was indicted for forging the following order: "Oct. 27th, 1884, Mr. R. T. Long, Please let Henry Carmone have 500 dollars and I will be in Monday and pay you and oblige, J. M. Hawood." J. M. Haywood testified that he wrote his name "J. M. Haywood" and not "Hawood," and R. T. Long testified that he took the order to be for five dollars, and let the defendant have a pair of boots on it: *Held*, that an instruction that if the defendant presented the paper with intent to defraud, and it was intended to represent the name of J. M. Haywood, even though it was spelled improperly, he would be guilty, was not erroneous. Covington, 94—913.

An indictment for forging a bond by one of the obligors named therein against another of the obligors named, may allege the forging of the whole instrument by the obligor committing the forgery of the name of the other. Gardiner, 23 (1 Ired.), 27.

Where an order is forged and drawn in the name of an overseer and agent upon his principal, and the purpose is to defraud the principal, the indictment for such forgery must aver that the person whose name is forged is the agent, and that he has authority to draw on his principal; otherwise the court cannot see that the false paper had a tendency to defraud the principal, or how it could have been used for such a purpose. Distinguishing *State v. Lamb*, 65 N. C., 419. *Thorn*, 66—644.

On indictment for forging a money-order payable "*at the store of*" a certain manufacturing company, the words "*store of*" sufficiently indicate the existence of an association by that name, without the express averment that the company was a corporation. Shaw, 92—768.

Where the indictment alleges the forgery of "an order for the payment of money and the delivery of goods," and the order is introduced as follows: "Fifty cents, 50, payable in merchandise at the store of the R. Mfg. Co. J. H. F., Treasurer," there is no variance. Shaw, 92—768.

The omission of the word "dollars" in the following order: "Please let young lady have the amount of 300 and charge the same to me," is not fatal to the indictment. Keeter, 80—472.

Where a genuine instrument is altered so as to give it a different effect, as changing the date of a note, the forgery may be specifically alleged as constituted by the alterations, or the forging of the entire instrument may be charged. Weaver, 35 (13 Ired.), 491.

An indictment for forgery contained four counts; the first count was for forgery under the statute, while the second was at common law for uttering forged paper. The jury at first returned that they had disagreed, but on being polled, stated that they found defendants guilty on the first and second counts, but could not agree on the others. A *nol pros.* was entered as to the third and fourth counts, and the jury having retired again returned with a verdict of guilty: *Held*, that a motion in arrest of judgment on the ground that there was a general verdict of guilty on an indictment con-

taining two counts charging offences not punishable alike could not be sustained, since there was in effect a distinct verdict of guilty on each of the two first counts, and the verdict on the first supported the judgment. *Cross and White*, 106—650, and 110—770.

Where the instrument alleged to be forged, upon its face, has a tendency to deceive or prejudice the rights of persons, it is only necessary to set it forth in the indictment and aver its falsity; but if the tendency and capacity to deceive depend upon extrinsic facts they must be set forth in the bill in connection with the instrument and the averments of its fraudulent character. *Covington*, 94—913.

A charge that defendant forged a receipt against "a book account" is too indefinite. *Dalton*, 6 (2 *Murph.*), 379.

A charge of the forgery of an *acquittance and receipt for money* is sustained by proof of the receipt of a "book account in full," since all debts are payable in money unless otherwise explained. *Dalton*, 8 (1 *Hawks*), 3.

On indictment for forgery of a deed the omission of a figure in the description of the land is fatal. *Street*, 1 (*Tay. Rep.*), 98.

On indictment for forging a bond it is not necessary to allege that there was a subscribing witness thereto, though there was in fact one. *Ballard*, 6 (2 *Murph.*), 186.

Defendant was charged with the forgery of the following order: "Dulks & Helker: You will please pay to the boy \$3.00 in merchandise and oblige, J. B. Runkins." On the trial it appeared that the true name of the alleged drawer was J. B. Rankin, and of the drawee firm, Helker & Duts, that defendant could not write, and that he obtained merchandise from Helker & Duts on the faith of the forged order: *Held*, that the variation in the spelling of the names comes within the principle *idem sonans*, and that the reversed order of the firm name is not material variance. *Lane*, 80—407.

EVIDENCE.—The possession of a forged order and the fact that defendant obtained goods thereon is sufficient proof that he either forged or assented to the forgery of the order, and the fact that he could not write does not rebut the presumption of guilt. *Lane*, 80—407.

EVIDENCE OF VENUE.—Evidence that defendant received the identical paper alleged to be forged, in blank form, from the cashier of a bank in the county in which the forgery is alleged to have been committed, and that he produced it with the blanks filled out in that county about a week afterwards, is sufficient to justify a conclusion that he forged it in that county. *Morgan*, 19 (2 *D. & B.*), 348.

PUNISHMENT.—One convicted of forgery may be punished by imprisonment in the penitentiary, though the indictment charges an offence not within the statute but at common law. *Williams*, 86—671.

JURISDICTION.—The forgery of a note which is placed in a national bank for the purpose of supporting a false entry on the books of the bank, and the making of the false entry for the purpose of deceiving the national bank examiner are distinct and separate offences, and the fact that the courts of the United States have exclusive jurisdiction of the offence of making the false entry, under *Rev. St. U. S.*, sec. 5209, does not deprive the state courts of jurisdiction to try and punish for the forgery of the note, since neither crime is a constituent element of the other, and a person may be guilty of the one and not the other. *Cross and White*, 106—650, and 101—770.

Rev. St. U. S., sec. 5418, providing that "every person who falsely makes, alters, forges or counterfeits any bid, proposal, guarantee, official bond, public record, affidavit or other writing for the purpose of defrauding the United States," does not embrace a note forged by bank officials against individuals and placed in the bank for the purpose of deceiving the national bank examiner, since it does not appear that the federal government

has any pecuniary interest in the matter. The statute is manifestly directed against frauds against the government in its fiscal operations, and the expression "or other writing" following the enumeration of the things to be forged, which omits bills and notes, must be restricted to the class to which it belongs and the obvious scope and operation of the statute. *Ib.*

In such case, a plea in abatement to the jurisdiction of the state court must aver that the forgery of the note was "for the purpose of defrauding the United States." *Ib.*

VARIANCE.—Where the indictment charges the forgery of a deed and sets out the description, giving the first line as "South *twenty* West," and the deed calls for "South *twenty-two* West," the variance is fatal. The misrecital extends beyond the mere form of the deed and affects the substance. *Street, 2 (Taylor's Rep.), 98.*

An indictment for forging an order for \$60.07 is not sustained where the only evidence introduced relates to two orders, one for \$60 and the other for \$60.27. *Smith, 78—462.*

Where the indictment charges the forgery of the name of a firm with intent to defraud two persons whose names are stated, but it is not alleged that they composed the firm, and the testimony proves the forgery with an intent to defraud the firm, but it is not proved that the two persons named composed the firm, the allegations of the indictment are not sustained. *Harrison, 69—143.*

IDEM SONANS.—Where the indictment charged that the name forged was "Major Vass," and the signature proven is "Maj. Vase" there is no variance, the name being *idem sonans*. *Collins, 115—716.*

The state may show that a witness whose name is W. W. Vass is commonly known as "Maj. Vass." *Collins, 115—716.*

EVIDENCE SUFFICIENT.—There was evidence that the prosecutor's cashier missed from his employer's check book two numbered blank checks; that on the afternoon of the same day defendant, who had been seen about the prosecutor's office during the forenoon, presented a check at the bank, numbered like one of the missing blank checks, and fraudulently purporting to be signed by the prosecutor; that, on being questioned by the bank teller, defendant tore up the check and ran away; and that when arrested a part of the signed check was found on him, together with a blank check, the number on which corresponded with one of the missing checks: *Held*, that the evidence was sufficient to establish the charge of forgery. *Matlock, 119—806.*

ONLY FRAUDULENT INTENT NECESSARY.—To sustain an indictment for forgery it is not necessary that the forgery should have been "calculated to deceive and did deceive," but only that there was a fraudulent intent to deceive by a forged paper, however awkwardly or clumsily the signature may have been written. *Collins, 115—716.*

A fraudulent intent is a necessary ingredient in the offence of forgery, and, therefore, a charge that signing the name of another without authority is forgery, without stating that it must be done with fraudulent intent, is erroneous. *Wolf, 122—1079.*

Sec. 166 (1030). Forgery and counterfeiting bank-notes, checks and other securities. R. C., c. 34, s. 60. 1819, c. 994, s. 1.

If any person shall falsely make, forge or counterfeit, or cause or procure the same to be done, or willingly aid or assist therein, any bill or note in imitation of, or purporting to be, a bill or note of any incorporated bank in this state, or in any of the United States, or in any of the territories of the United States; or any

order or check on any such bank or corporation, or on the cashier thereof; or any of the securities purporting to be issued by and on behalf of the state, or by or on behalf of any corporation, with intent to injure or defraud any person, bank or corporation, or the state, the person so offending shall be guilty of felony, and punished in like manner as if he had been convicted under the preceding section.

INDICTMENT.—An indictment which charges merely an intention to pass counterfeit bank-notes knowing them to be counterfeit, without charging any culpable act, cannot be sustained. Penny, 4 (Repos. 7, Tay. T.), 130.

An indictment for passing a counterfeit bank-note of \$100 "on the Bank of the State of South Carolina" sufficiently avers the existence of such a bank as the Bank of the State of South Carolina. Ward, 9 (2 Hawks), 443.

CHARGE—VARIANCE.—Defendant was indicted for the forgery of the following order: "Mr. Miller, pleas send me 3 gals. whiskey I will send you money. D. S. Dec. 24th 1888." It was in evidence that the order was fraudulently signed by defendant without the authority of D. S.; that Miller and one Basinger were partners distilling and selling liquor, and that the order was presented to Basinger and the whiskey obtained from him. The indictment contained two counts, one charging an intent to defraud Miller and the other to defraud D. S. Defendant asked the court to instruct the jury that there was a variance in that the bill alleged an intent to defraud Miller while the proof showed that the whiskey was obtained from Basinger, but the court charged that if the jury found that Miller and Basinger were partners, and the defendant signed the order as set forth in the indictment, the charge to defraud Miller would be sustained if Basinger filled the order believing it to have been signed by D. S.: *Held*, no error, since the forgery of the order on Miller and its presentation to his partner was ample evidence of the intent to defraud, and it was not necessary that any one should in fact have been defrauded. Upon an allegation of an intent to defraud A, it is no variance to show an intent to defraud A and B. Hall, 108—776.

Sec. 167 (1031). Forgery and counterfeiting, passing or attempting to pass, notes forged or counterfeited. R. C., c. 34, s. 61. 1819, c. 994, s. 2.

If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited bill, note, order, check, or security, as is mentioned in the preceding section; or shall pass or deliver, or attempt to pass, or deliver any of them to another person (knowing the same to be falsely forged or counterfeited), the person so offending shall be punished by imprisonment in the county jail or penitentiary not less than four months nor more than ten years.

Sec. 168 (1032). Forgery and counterfeiting of certificates of stock by officer or agent of a corporation. R. C., c. 34, s. 62.

If any officer or agent of a corporation shall, falsely and with a fraudulent purpose, make with the intent that the same shall be issued and delivered to any other person by name or as holder or bearer thereof, any certificate or other writing, whereby it is

certified or declared that such person, or holder, or bearer, is entitled to or has interest in the stock of such corporation, when in fact such person, or holder, or bearer, is not so entitled, or is not entitled to the amount of stock in such certificate or writing specified; or if any officer or agent of such corporation, or other person, knowing such certificate or other writing to be false or untrue, shall transfer, assign, or deliver the same to another person, for the sake of gain, or with intent to defraud the corporation, or any member thereof, or such person to whom the same shall be transferred, assigned or delivered, the person so offending shall suffer the same punishment as is prescribed in the preceding section.

Sec. 169 (1033). Forgery and counterfeiting, selling forged judgments, bonds or other securities. R. C., c. 34, s. 63.

If any person shall sell, by delivery, indorsement, or otherwise, to any other person, any judgment for the recovery of money purporting to have been rendered by a justice of the peace, or any bond, promissory note, bill of exchange, order, draft, or liquidated account purporting to be signed by the debtor (knowing the same to be forged), the person so offending shall be punished by imprisonment in the penitentiary or county jail, for not less than four months nor more than ten years.

Sec. 170 (1034). Forgery of names to petitions and certain other papers; punishment therefor and for using such forged paper. 1883, c. 275.

Any person who shall wilfully sign, or cause to be signed, or wilfully assents to the signing of the name of any person without his consent, or of any deceased or fictitious person to any petition or recommendation with the intent of procuring any commutation of sentence, pardon, or reprieve of any person convicted of any crime or offence, or for the purpose of procuring such pardon, reprieve or commutation, to be refused or delayed by any public officer, or with the intent of procuring from any person whatsoever, either for himself or another, any appointment to office, or to any position of honor or trust, or with the intent to influence the official action of any public officer in the management, conduct or decision of any matter affecting the public, shall be guilty of a misdemeanor, and fined not exceeding one thousand dollars, or imprisoned in the county jail or penitentiary not exceeding five years, or both, at the discretion of the judge; and any person who shall wilfully use any such paper for any of the purposes or intents above recited, knowing that any part of the signatures to such petition or recommendation has been signed thereto without the consent of the alleged signers, or that names

of any dead or fictitious persons are signed thereto, shall be guilty of a misdemeanor, and punished in like manner and degree.

Sec. 171 (1035). Forgery and counterfeiting of foreign coin, passing or attempting to pass such coin. R. C., c. 34, s. 64. 1811, c. 814, s. 3.

If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting the resemblance or similitude or likeness of a Spanish milled dollar, or any foreign coin of gold or silver, which is in common use and received in the discharge of contracts by the citizens of the state; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the state from any other place, with intent to pass, utter, publish, or sell as true, any such false, forged, or counterfeited coin, knowing the same to be false, forged, or counterfeited, with intent to defraud any corporation, or any person whatsoever, every person so offending shall be guilty of a misdemeanor, and punished by imprisonment in the penitentiary or county jail, for not less than four months nor more than ten years.

Sec. 172 (1036). Forgery and counterfeiting, having in possession instruments for counterfeiting foreign coin. R. C., c. 34, s. 65. 1811, c. 814, s. 4.

If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of a Spanish milled dollar, or other foreign coin made of gold or silver, which is in common use and received in discharge of contracts by the citizens of the state, and shall be duly convicted thereof, the person so offending shall suffer as prescribed in the preceding section, and shall be further liable to be fined, at the discretion of the court, not more than five hundred dollars, and be imprisoned not more than twelve months.

Sec. 173 (1037). Forgery and counterfeiting, fraudulently connecting different parts of several genuine bank notes, or other instruments. R. C., c. 34, s. 66.

If any person shall fraudulently connect together different parts of two or more bank notes, or other genuine instruments, in such manner as to produce another note or instrument, with intent to pass all of them as genuine, the same shall be deemed a forgery, and the instrument so produced a forged note, or forged instrument, in like manner as if each of them had been falsely made or forged.

Sec. 174 (1038). Forgery and counterfeiting of private marks, stamps or labels. 1870-'1, c. 253, s. 1.

Every person who shall knowingly and wilfully forge, or counterfeit or cause or procure to be forged or counterfeited, the private marks, tokens, stamps or labels of any mechanic, manufac-

turer or other person being a resident of this state or of the United States, with intent to deceive and defraud the purchasers, mechanics or manufacturers of any goods, wares or merchandise whatsoever, upon conviction thereof shall be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars, or by imprisonment of not less than thirty days or more than five years, or both fine and imprisonment, at the discretion of the court.

Sec. 175 (1039). Forgery and counterfeiting, penalty for selling merchandise with forged or counterfeited marks, stamps or labels. 1870-'1, c. 253, s. 2.

Every person who shall vend any goods, wares or merchandise having thereon any forged or counterfeited marks, tokens, stamps or labels purporting to be the marks, tokens, stamps or labels of any person being a resident of the state or of the United States, knowing the same at the time of the purchase thereof by him to be forged or counterfeited, shall be guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both fine and imprisonment, at the discretion of the court.

Sec. 176 (1040). Forgery and counterfeiting, fraudulent use of brands. 1874-'75, c. 225.

If any person shall knowingly use the mark or brand of any person on any sack, or shall knowingly impress on any sack the mark or brand of another person, with intent to defraud or for the purpose of enhancing the value of his own property, the person so offending shall be guilty of a misdemeanor, and punished as if convicted of larceny.

FORMER CONVICTION OR ACQUITTAL.

Former conviction or acquittal must be pleaded to be available. Chancy, 110—507.

Regularly the two pleas of "former conviction" and "not guilty" should be tried separately, since the former implies an admission of the criminal act and is inconsistent with an absolute denial. Winchester, 113—641.

But the practice of trying the two pleas together is common and convenient, and where there is no exception on that ground it will be presumed that the course was pursued with the consent of defendant. Winchester, 113—641.

Where, on appeal, a new trial was granted on the ground that the judge erred in submitting the case to the jury when there was not sufficient evidence to warrant it, the defendant cannot, on the new trial, plead former

acquittal, for he was convicted in the court below; nor can he plead former conviction for it was set aside and a new trial granted. *Rhodes*, 112—857.

A plea of both former acquittal and not guilty may be entered, but the jury cannot try the issues raised at the same time, and after a verdict against defendant on a plea of former acquittal the trial should then proceed on the plea of not guilty. *Respess*, 85—534.

The record of a former conviction or acquittal is the best evidence, and must be produced or its loss shown. *Chancy*, 110—507.

A person may be convicted for an assault and battery convicted in the presence of the court, though he had previously been fined for contempt of court in doing the same act, since the same act constitutes two offences, one against the court, and the other against the public peace. *Yancey*, 4 (*Repos. & Tay. T.*), 133.

A defendant may plead both former acquittal and not guilty, but the jury cannot try the issues raised at the same time. After verdict against defendant on the plea of former acquittal, the court should proceed to trial on that of not guilty. *Respess*, 85—534.

Where defendant fires his gun at a crowd of eighteen or more persons and two persons are hit, an acquittal on an indictment charging an assault and battery on one of the persons hit, is no bar to a prosecution for the same offence committed on the other, since an indiscriminate assault upon several persons is a distinct assault on each. *Ashe, J., dissenting. Nash*, 86—650.

When defendant, after learning of an indictment against him in the superior court for assault and battery but before being arrested, procures himself to be indicted in the county court and there voluntarily submits and is fined, the plea of former conviction is good against the indictment in the superior court. *Casey*, 44 (*Bush.*), 209.

In order to show the identity of the cases, it is competent for defendant to prove by one who was not a witness on the former trial what a witness who was examined on behalf of the state on that trial deposed to, though such witness is still alive and within the county. *Smith*, 33 (11 *Ired.*), 33.

Where an assault and battery is committed in a riot, on indictment for the riot a plea of former conviction for the assault and battery will operate as a bar to the indictment for the riot, since the state cannot divide an offence consisting of several trespasses into as many indictments as there are acts of trespass. *Ingles*, 3 (2 *Hay. Rep.*), 148.

Where two are indicted for an affray, and one pleads former conviction, which plea is tried before the plea of not guilty, the other defendant has never been in jeopardy, and may be tried for the offence. *Weaver*, 93—595.

Conviction for a riot is a bar to a prosecution for an assault committed in the riot, and which was given in evidence on the trial for the same. *Lindsay*, 61 (*Phil. Law*), 468.

Where the defendant in a warrant for bastardy, having agreed upon terms of settlement with the prosecutrix, paid the costs and the justice who issued the warrant burned the papers and did not docket the warrant or other proceedings or render any judgment and the defendant was discharged: *Held*, that such facts did not establish a case of former trial and conviction, or bar a subsequent prosecution for the same offence. *Robertson*, 122—1045.

An acquittal upon an indictment for burglary and stealing goods is not a good plea to a second indictment for the same burglary with *intent to steal*, since upon the first indictment defendant could not have been convicted upon proof of an intent to steal. *Jesse*, 20 (3 *D. & B.*), 98.

A conviction for assault with a pistol will not sustain a plea of former

conviction in a subsequent trial for carrying the pistol concealed. Robinson, 116—1046.

A mistrial in a case not capital is a matter of discretion, and a plea of former jeopardy because of a mistrial ordered on a former trial of a defendant for the same offence cannot be sustained. Collins, 115—716.

A single act may be an offence against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt defendant from prosecution and punishment under the other. Robinson, 116—1046.

Where defendants are bound to keep the streets of a town in repair, and if several streets are presented the same day, a conviction on one, where separate bills are found, may be pleaded in bar of the others. Commissioners, 6 (2 Murph.), 371.

Where, on motion in arrest of judgment, the court sets the verdict aside and a new trial is had upon another bill, a plea of former conviction cannot be sustained, since if the first indictment was so defective as to warrant arrest of judgment the defendant cannot be considered as having been in jeopardy. Lee, 114—844.

On indictment for forcible entry a plea of former acquittal for forcible trespass for the same transaction is good. Lawson, 123—740.

Where a plea of former acquittal is sustained, no appeal can be taken by the state, although such plea is a mixed question of law and fact, and the court erred in not submitting it to the jury. Lane, 78—547.

FORMER JEOPARDY.

FORMER JEOPARDY—DISCHARGE OF PRISONER.—In a case where three persons were on trial for murder, the prisoners proposed that they should be examined as witnesses for each other. The state objected, but the court allowed the motion, and thereupon the solicitor appealed, and the court to allow him such appeal, against the objection of the prisoners, withdrew a juror and made a mistrial: *Held*, to have been an erroneous exercise of discretion, and that thereupon the prisoners were entitled to a discharge. Prince, 63—529.

Where the judge is absent from the court and telegraphs the clerk to withdraw a juror, make a mistrial and discharge the jury, and the clerk does so, the prisoner is entitled to be discharged. It is the duty of a judge to be personally present in court, and to find judicially the facts upon which his conclusions are based. Jefferson, 66—309.

Where the court orders a mistrial on the ground that one of the jurors has fraudulently procured himself to be selected at the instance of the prisoner to secure an acquittal, there has been no jeopardy, and an order remanding the prisoner for another trial is proper. Bell, 81 591.

The discharge of a jury before verdict in a capital case, on Monday of the second week of the term and before the term expired, after a deliberation of forty-five hours, is erroneous, and entitles the prisoner to his discharge. Alman, 64—364.

Where a juror is withdrawn and a mistrial ordered, the prisoner may be put to a second trial upon the same bill. Washington, 90—664.

The jury were out considering their verdict for ten days, but came into court twice, and, being polled each time, declared they would never agree,

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and the court directed a juror to be withdrawn and a mistrial entered: *Held*, no error, and that the prisoner had never been in jeopardy. Carland, 90—668.

Where the jury returns an insensible verdict it is proper for the court to instruct them again, and where upon further instruction they fail to agree from Tuesday to Saturday night, when the term would expire, an order of mistrial is proper. Whitson, 111—695.

FORNICATION AND ADULTERY.

Sec. 177 (1041). Fornication and adultery. R. C., c. 34, s. 45. 1805, c. 684.

If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: *Provided*, that the admissions or confessions of one shall not be received in evidence against the other.

INDICTMENT.—An indictment which alleges that defendants “did unlawfully and adulterously bed and cohabit together,” is sufficient without an averment that they were not married, or that they were male and female, since the averment of the adulterous intercourse implies the absence of the marriage relation and also implies that the parties are of different sexes. Lashley, 84—754.

An indictment which charges that defendants, not being united in marriage “unlawfully did associate, bed and cohabit together, and then and there did commit fornication and adultery,” is sufficient, since the language used must imply that they did “lewdly and lasciviously associate.” Stubbs, 108 774.

An indictment charging that defendants “did unlawfully and adulterously bed and cohabit together, and then and there did unlawfully commit fornication and adultery,” is sufficient. Tally, 75—322.

The indictment need not allege that either of the defendants had ever taken the other into his or her house and that they had lived together. Jolly, 20 (3 D. & B.), 110.

Judgment cannot be arrested because one of the defendants, a married woman is described as “spinster.” Guest, 100—410..

EVIDENCE.—The evidence was that the male defendant, an orphan and a cripple, when ten years old went to live with one H, with whom the female defendant resided; that she assisted in caring for him, and at H's death both defendants moved to another place and have since lived together in a house in which there were three beds; that they are aged, the male 23, the female 50 years; and a witness testified that he went there one morning at 4 o'clock and saw the female in one bed, the other beds in the room not tumbled, and the male was up and dressed, but witness did not know where he staid that night. It was not shown that there was but one room in the house: *Held*, that the evidence was not sufficient to warrant a verdict of guilty. Waller, 80—401.

Defendant denied his guilt and swore that he was surprised at the charge when he first heard of it, and that his wife had never made such a charge or referred to it: *Held*, that it was competent to prove by a witness defendant's admission that he did know of the charge prior to the time to which he had sworn, and that he had been charged by his wife with the offence. *Crane*, 110—530.

Where various independent circumstances are relied on by the state, an instruction that the jury must be satisfied upon the whole evidence is sufficient. *Crane*, 110—530.

Evidence was offered tending to prove that the male defendant, white, and the female defendant, colored, had several times been seen riding together in the male defendant's vehicle; that they frequently ate at the same table; that the female defendant, who was a married woman, but who had left her husband, had given birth to two children after separating from her husband; that the male defendant had been seen nursing and playing with them, and had his picture taken with theirs, and that the female defendant employed servants for both: *Held*, sufficient to warrant a conviction. *Chancy*, 110—507.

More than two years before the indictment the male defendant was seen taking very indecent liberties with the female defendant, and she, on being remonstrated with, said in the presence of the other defendant, "it was pretty much as they had done." There was evidence that they lived half a mile apart, and they continued to associate with each other after the act described for a year, in which time the male defendant visited her house often twice a week: *Held*, that the evidence was sufficient to be submitted to the jury. *Dukes*, 119—782.

Evidence of facts transpiring after the finding of the bill and tending to show guilt is admissible. *Roby*, 121—682.

Where evidence of adulterous intercourse in another county is shown in connection with evidence of such acts in the county in which the action is tried, the defendants cannot be convicted for the acts committed in another county, and a failure of the judge to so charge upon request, is error. *Beard*, 124—811.

While evidence of an act of illicit intercourse occurring more than two years before the indictment is not competent as substantive testimony, it may be considered, if believed, as corroborative evidence of subsequent association. *Dukes*, 119—782.

Evidence that defendants were seen working together in a field, although slight, is competent as tending to show, with other circumstances, that defendants are living together in adultery. *Roby*, 121—682.

Evidence that defendants lived together about three months before they were married and had prior to that time moved to a distant place and had returned is sufficient to be submitted to the jury. *Roby*, 121—682.

A photograph of defendant was introduced, on the back of which, signed with his name, were words purporting to be a marriage to his wife and indicating that the one to whom the message was addressed was married, and the alleged wife, the prosecutrix, testified that the writing was that of the defendant and that the photograph had been sent to her: *Held*, that such writing was admissible as an acknowledgment of marriage. *Behrman*, 114—797.

A paper writing purporting to be a contract of marriage, and to be signed by the contracting parties at the time of the alleged marriage, is admissible, not only in corroboration of a witness who testified to the facts, but also as substantive evidence to prove the marriage. *Behrman*, 114—797.

Where the material issue was whether the prosecuting witness and defendant were married in a foreign country, a certificate by the officiating rabbi, attesting the marriage and certified by the signature and seal of the

official minister of such foreign country, although inadmissible as a record or an independent declaration of the rabbi, it was competent as part of the *res gestae* to support the testimony of the prosecuting witness as to the fact of the marriage. Behrman, 114—797.

Evidence that the female defendant told a witness for the state, before the indictment, that her brother had driven her away from home, and that her father had paid the male defendant, who had married her cousin, to take her on his farm as a work-hand, is inadmissible, since what a party says exculpatory of himself after the offence was committed, and not part of the *res gestae*, is not evidence for him. Stubbs, 108—774.

After much evidence tending to prove the unlawful relations of the defendants had been introduced, a witness testified that he met the male defendant one night within a short distance of the female defendant's house, going in that direction, when defendant said he was going to another place, and that on a subsequent investigation of the matter before a local society he denied making such a statement: *Held*, that the evidence was competent as corroborative of other testimony of visits to the female's residence. Austin, 108—780.

A witness who testifies that he has often seen defendant write, and knows his handwriting, is competent to express an opinion as to whether a letter in controversy was written by defendant. Gay, 94 814.

It is not competent to ask a witness, with a view to discredit him, whether he had ever had sexual intercourse with any woman except his wife since his marriage. *Ib*.

It is not error for the judge in charging the jury to say to them that the testimony of a witness who proves a good character, is entitled to more weight than the testimony of one who is shown to be of a bad character. *Ib*.

A *capias* with the return "not to be found," cannot be introduced in evidence for the purpose of proving the flight of the defendant in the absence of any evidence that he resided in the county to which the *capias* was issued. Jones, 93—611.

Evidence that defendants had been seen driving together since the prosecution began is admissible, in connection with other evidence, going to show their lascivious association within two years prior to the beginning of the action. Stubbs, 108—774.

Where there is no evidence that the female defendant is a single woman, or that she is not defendant's wife, or that her child, born while she lived at defendant's house, is a bastard, the evidence is insufficient to be submitted to the jury. Pope, 109—.

Evidence that the male defendant has heard the *feme* defendant's father order her to leave his house, and that he had seen letters from her father and brother declaring she could not stay at her father's house, is of slight importance, and the exclusion of the evidence in reference to the letters only is too slight to constitute ground for a new trial, since mention of the letters was simply cumulative. Stubbs, 108—774.

On cross-examination of a state's witness, defendants proposed to ask him if he had not been prompted to swear against defendants by B, who had not been examined as a witness; the court permitted the question to be put omitting B's name: *Held*, that while the inquiry was unobjectionable, yet as it did not seem to be material, and it did not appear that defendants were prejudiced by its rejection, a *venire de novo* would not be granted. Sidden, 104—845.

A physician testified that the male defendant employed and paid him to attend the female defendant when sick, alleging that she was related to him; another witness testified that on several nights while she was sick he saw the male defendant at her house, and more than once on the bed with her with his clothes on; a third witness testified that, as a policeman, he

put one C out of her house at night at the instance of the male defendant, and saw defendant go in soon after; C testified that after he was put out of the house, he went several nights to her house and heard them, from the outside, undress and go to bed together, and that the male defendant furnished her the house; another witness testified that he lived near the woman's house, and that defendant was in the habit of going to her house early in the night and leaving early in the morning: *Held*, that while the testimony, if believed as a whole, was sufficient to sustain a verdict of guilty, it was error to instruct the jury that, if they believed the evidence, defendant was guilty. *Dixon*, 104-704.

Evidence of acts of illicit intercourse prior to a former conviction pleaded is competent as corroborative or explanatory evidence. *Wheeler*, 104-893.

Evidence of acts of adultery anterior to the two years preceding the indictment, is competent to be considered in connection with other evidence of like nature within the two years. *Pippin*, 88-646.

Evidence that prior to a former indictment and acquittal of defendants on a charge of fornication and adultery, and more than two years before the present indictment was found, "the children of the female defendant had been heard in her presence to call the male defendant papa," is competent in corroboration of other evidence of adultery. *Kemp*, 87-538.

Where a female defendant had given birth to several children, of whom all but one were dead, evidence that the male defendant, while caressing the living child, spoke of it as his, and on another occasion had been heard to say he believed the others were his children also, is incompetent against the woman as coming within the prohibition of the statute, and where the court fails to tell the jury that they could not consider such statements as evidence against the woman, there is error invalidating the verdict, though no exception to the evidence was taken on the trial, since no exception is necessary where the evidence is made incompetent by statute. *Ballard*, 79-627.

Evidence that the male defendant had a wife living and the female defendant had a husband living at the time of the commission of the offence is competent, though such facts are admitted, since they go to prove defendants are not married to each other, and if the fact is admitted the evidence is then merely cumulative. *Manly*, 95-661.

On the trial of a criminal action it is competent to show that defendant had attempted to bribe one of the jurors. *Case*, 93-545.

Where a witness testifies that he went early one morning to the house of one of the defendants, and on knocking was, after some hesitation, admitted by the female defendant, who came to the door with her dress unfastened; that the male defendant was in the only bed in the room; that the female's shoes were near the head of the bed, and that the bed seemed very much tumbled; that there were two other rooms in the house, but the doors were closed and witness could not see whether they contained a bed or not; and another witness testifies that the female defendant had lived in the house with the male defendant four of five years, and that her husband is dead, the evidence is sufficient to be submitted to the jury. *Poteet*, 30 (8 Ired.), 23.

The husband of a woman who has pleaded guilty to an indictment for fornication and adultery, is a competent witness for the state on the trial of the other defendant. *Guest*, 100-410.

Evidence of acts of adultery committed more than two years prior to the finding of the bill, is competent in explanation of other acts of like nature committed within that period. *Guest*, 100-410.

Evidence of acts of adultery committed outside the county in which the trial takes place, is competent in explanation of acts committed in the county. *Guest*, 100-410.

ONE MAY BE ACQUITTED AND THE OTHER CONVICTED.—Where one defendant is tried and acquitted for want of proof, the other may be afterwards tried and convicted, since there can be no estoppel as to the state *in favor* of a party not on trial, as there is none *against* him when put on trial for this offence after conviction of the other party. Overruling *State v. Mainor*, 28—340. Cutshall, 109—764.

Where, on a trial for fornication and adultery, the male defendant is found guilty and the female not guilty, no judgment can be pronounced against the male defendant, since the crime charged cannot be committed but by both of them, and upon a verdict of not guilty as to one it appears cumulatively that the other cannot be guilty. Overruled in *State v. Cutshall*, 109—764. *Mainor*, 28 (6 Ired.), 340.

HUSBAND AND WIFE AS WITNESSES.—The divorced husband of the female defendant is incompetent to testify against the defendants as to adulterous intercourse which occurred between defendants while the marriage subsisted. *Jolly*, 20 (3 D. & B.), 110.

The husband of the female defendant who has obtained a divorce *a vinculo matrimonii* from her after the finding of the bill, but before trial, is not a competent witness *against* her as to the adulterous intercourse which took place while the marriage subsisted. Following *State v. Jolly*, (3 D. & B.), 110; *Jones*, 89-559.

The husband of the *feme* defendant is a competent witness against her to prove her marriage to him. The Code, sec. 588, makes the husband or wife incompetent "except to prove the fact of marriage." McDuffie, 107-885.

MARRIAGE WHILE FIRST WIFE LIVING.—A man who, during the life-time of his first wife, goes through the ceremony of marriage with another woman, and lives with her for years as man and wife, may be convicted of fornication and adultery notwithstanding his co-defendant may be acquitted by showing that she was without fault, ignorant of the facts, since there may be an unlawful sexual intercourse where one party has a guilty intent, and the other, through ignorance of the facts, has no such intent. *Merrimon*, C. J., *dissenting*. Cutshall, 109—764.

BURDEN OF PROOF AS TO MARRIAGE.—It is not necessary for the state to prove that defendants are not married, since the question whether they are married or not is a matter peculiarly within their knowledge, and the burden is on them to show a marriage if such exists. McDuffie, 107-885.

MARRIAGE BETWEEN WHITE AND COLORED PERSONS.—Where a white woman leaves this state for the purpose of evading its laws in consummating a marriage with a negro, *but with no intent to return*, and the marriage takes place in a state whose laws permit such marriage, the negro being a resident of that state, the marriage is valid in this state, and defendants cannot be convicted of fornication and adultery, though they afterwards come to this state to reside. *Reade and Bynum*, J. J., *dissenting*. *Ross*, 76-242.

A marriage solemnized in a state whose laws permit such marriages, between a negro and a white person domiciled in this state and who leave it for the purpose of evading its laws and with intent to return, is not valid in this state. *Kennedy*, 76-251.

TRIAL OF ONE WITHOUT THE OTHER.—A trial may be had as to one of the defendants, though the other has not been taken. *Lyerly*, 52 (7 Jones), 158.

The solicitor may enter a *not pros.* as to one of the defendants and use that one as a witness to prove the offence against the other. *Phipps*, 76-203.

JUDGMENT PASSED AGAINST ONE AND NEW TRIAL GRANTED THE OTHER.—Where, after conviction of both defendants on the confession of the male defendant, the female is granted a new trial because the confessions were received against her, the court may still pass judgment upon the male defendant. *Parham*, 50 (5 Jones), 416.

PUNISHMENT.—Persons convicted of fornication and adultery may be imprisoned in the county jail. *Manly*, 95-661.

The court during the term may reduce the term of imprisonment. Ib.

INTERCOURSE PROCURED PARTLY BY VIOLENCE.—Where the evidence establishes the fact that defendants habitually cohabited together, the fact that the female defendant sometimes yielded through fear of violence, is not sufficient to entitle them to an acquittal of the offence as charged, since, while the male defendant may be guilty of the more heinous offence of rape, they both may still be guilty of fornication and adultery. Summers, 98-702.

CHARGE.—It is not error to refuse to charge that if the jury were not satisfied of the guilt of defendants from the evidence of witnesses who testified that they saw defendants in actual sexual intercourse, they should acquit when there is other evidence of the male defendant stealthily visiting the female defendant's house at night, of his being in the room alone with her and the lights extinguished, and of other circumstances of a suspicious nature. Austin, 108-780.

SPECIAL VERDICT—MARRIAGE.—Where a special verdict is returned, finding that the defendant was married to one G, who had living at that time another wife, but that the jury did not know whether she knew of this fact or not, a verdict of guilty should be entered, since it was incumbent on the defendant to show that she did not know of it. Cody, 111-725.

ACTS IN ANOTHER COUNTY.—Defendants cannot be convicted for acts committed in another county. Beard, 124-811.

THE INTENT INFERRED.—The state is not required to prove criminal intent; this is inferred from the facts proved of habitual sexual intercourse between persons unmarried, and any extenuating circumstances must be shown by the defendant. Cody, 111-725.

FUGITIVES.

. See also EXTRADITION.

Sec. 178 (1165). Fugitives from justice; who may arrest. 1868-'9, c. 178, sub chap. 3, s. 33. 1895, c. 103.

Any justice of the supreme court, or any judge of the superior court or of any criminal court, or any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, on satisfactory information laid before him that any fugitive or other person in the state has committed, out of the state and within the United States, any offence which, by law of the state in which the offence was committed, is punishable either capitally or by imprisonment for one year or upwards in any state prison, shall have full power and authority, and is hereby required to issue a warrant for said fugitive or other person and commit him to any jail within the state for the space of six months, unless sooner demanded by the public authorities of the state wherein the offence may have been committed, pursuant to the act of congress in

that case made and provided: if no demand be made within that time the said fugitive or other person shall be liberated, unless sufficient cause be shown to the contrary.

No one has authority, without process legally issued in this state, to arrest a person charged with crime in another state and fleeing here for refuge. Such arrest makes the parties engaged in it guilty of assault and battery. Shelton, 79-605.

Upon a fugitive's surrendering to the state demanding his return in pursuance of national law, he may be tried in the state to which he is returned for any other offence than that specified in the requisition for his rendition, and in so trying him against his objection, no right, privilege or immunity secured to him by the constitution and laws of the United States is thereby denied. Glover, 112-896.

It is competent for the legislature in the exercise of its reserved sovereign powers, and as an act of courtesy to a sister state, to provide by statute for the surrender, upon requisition, of persons indictable for murder in such state, although they have never "fled from justice." Hall, 115-811.

Where one has been constructively present in a state by being deemed, by a legal fiction, to have followed an agency or instrumentality put in motion by him to accomplish a criminal purpose, he is not a fugitive from justice of such state so as to warrant the executive of this state to deliver him to the authorities of such state upon the requisition of the governor of the demanding state. Hall, 115-811.

A fugitive from justice is one who, having committed a crime in one jurisdiction, flees therefrom in order to evade the law and escapes punishment. Hall, 115-811.

No one can, in any sense, be alleged to have fled from the justice of a state in the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime. Hall, 115-811.

The distinction between the rights of a fugitive from justice under international and interstate extradition laws defined. Glover, 112-896.

Except in the case of a fugitive surrendered by a foreign government under treaty stipulations, when a person is within the jurisdiction of a court and there properly charged with crime, the court may hold and try him, no matter how he was brought within such jurisdiction. Glover, 112-896.

A prisoner arrested and held under the provisions of section 1165 of The Code cannot be lawfully detained, unless it be made to appear that he is liable to extradition under the act of congress, passed in pursuance of clause 2, section 2 of article 4 of the constitution of the United States. Hall, 115-811.

Sec. 179 (1166). Magistrates to keep record of the proceedings and transmit copy to the governor. 1868-'9, c. 178, sub chap. 3, s. 35.

Every magistrate committing any person under the preceding section, shall keep a record of the whole proceedings before him, and immediately transmit a copy thereof to the governor for such action as he may deem fit therein under the law.

Sec. 180 (1167). Duty of the governor. 1868-'9, c. 178, sub chap. 3, s. 36.

The governor shall immediately inform the governor of the state or territory in which the crime is alleged to have been com-

mitted, or the president of the United States, if it be alleged to have been committed within the District of Columbia, of the proceedings had in such case.

Sec. 181 (1168). Every sheriff or jailer shall surrender the fugitive upon the order of the governor. 1868-'9, c. 178, sub chap. 3, s. 37.

Every sheriff or jailer, in whose custody any person so committed shall be, upon the order of the governor, shall surrender him to the person named in such order.

Sec. 182 (1169). Governor may employ agent or offer reward for the apprehension of fugitives charged with felony. R. C., c. 35, s. 4. 1880, c. 561. 1886, c. 28. 1868-'9, c. 52. 1870-'1, c. 15. 1871-'2, c. 29. 1891, c. 421.

The governor, on information made to him of any person, whether the name of such person be known or unknown, having committed a felony or other infamous crime within the state, and having fled out of the jurisdiction thereof, or who conceals himself within the state to avoid arrest, or who having been convicted has escaped and cannot otherwise be apprehended, may either employ a special agent, with sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding four hundred dollars, according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed; and he may from time to time issue his warrants on the state treasurer for sufficient sums of money for such purpose.

FUTURES.

Sec. 183. Futures, and other vicious contracts, indictable. 1889, c. 221.

Every contract, whether in writing or not, whereby any person or persons, corporation or corporations shall agree to sell and deliver any cotton, Indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt, pork, salt fish, beef, cattle, sugar, coffee, stocks, bonds, and choses in action, at a place or places and at a time or times specified and agreed upon therein, to any other person or persons, corporation or corporations, whether the person to whom such article is so agreed to be sold and delivered shall be a party to

such contract or not, when, in fact, notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or to a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered; and every contract commonly called "futures" as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be utterly null and void and of no effect in law or equity; and no action shall be maintained in any court in this state to enforce any such contract, whether the same was made in or out of this state, or partly in and partly out of this state, and whether made by the parties thereto by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent or agents of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency.

When the defendant or defendants in any action pending in any court in this state shall allege specifically in his or their answer that the cause of action alleged in the complaint is in fact founded upon a contract such as is by this act made void, and such answer shall be verified, then, and in that case, the burden shall be upon the plaintiff in such action to prove by the proper evidence, other than any written evidence thereof, that the contract sued upon is a lawful one in its nature and purposes; that the defendant may likewise produce evidence to prove to the con-

trary: *Provided, nevertheless*, that any allegation or statement of fact made in any pleading in any such action, or the evidence produced on the trial in any such action, shall not be evidence against the party making or producing the same in any criminal action against such party.

Every person who shall become a party to any such contract as is by this act made void, and every person who shall be the agent, directly or indirectly, of any such party in making or furthering or effectuating the same; and every agent or officer of any corporation who shall, in any way or manner, knowingly aid in making or furthering any such contract to which such corporation shall be a party, shall be deemed guilty of a misdemeanor, and on conviction in the superior court shall be fined not less than one hundred dollars nor more than five hundred dollars, and may be imprisoned in the discretion of the court.

Every person who shall, while in this state, consent to become a party to any such contract made in another state, and every person who shall, as agent of any person or corporation who shall become a party to any such contract made in another state, in this state do any act, or in any way aid in this state in the making or furthering such a contract so made in another state, shall be deemed guilty of a misdemeanor, and on conviction in the superior court shall be fined not less than fifty nor more than two hundred dollars, and may be imprisoned in the discretion of the court.

GAMBLING.

SEC. 184. Betting at cards in tavern or retail house.

SEC. 185. Keeper of tavern or liquor-shop permitting games.

SEC. 186. Faro-banks and tables.

SEC. 187. Gaming tables of every kind prohibited.

SEC. 188. Person allowing gaming tables on premises.

SEC. 189. Lotteries forbidden.

SEC. 190. Sale of lottery tickets forbidden.

SEC. 191. Justices and others officers to destroy gaming tables.

SEC. 192. Justices and other judicial officers to summon witnesses.

SEC. 193. Money or property bet to be seized.

SEC. 194. Persons opposing destruction of gaming tables and seizure of money punished.

SEC. 195. Unlawful whether property staked or not.

SEC. 196. Gambling at agricultural fairs.

SEC. 197. Betting on elections.

Sec. 184 (1042). Gambling; betting at cards in tavern or retail house, a misdemeanor. R. C., c. 34, s. 75. 1799, c. 526. 1801, c. 581. 1831, c. 26.

If any person shall bet money, property, or other thing of value, whether the same be in stake or not, at any game of cards which shall be played in any ordinary, tavern, or house of entertainment, or in any house wherein spirituous liquors are retailed, or on any part of the premises occupied with such ordinary, tavern, house of entertainment, or house wherein spirituous liquors are sold as aforesaid, or shall play at such game of cards; the person so offending shall be guilty of a misdemeanor, and any fine imposed shall not be less than ten dollars.

Gambling in a house where liquors are retailed is indictable, whether such retailing be with or without license. Hawkins, 91-626.

The fact that the liquor-dealer had no license to sell is no defence. Terry, 20 (4 D. & B.), 185.

BETTING MUST BE CHARGED.—An indictment charging that defendants "unlawfully did play at a game of cards" without charging that they bet on the game, is defective. Brannen, 53 (8 Jones), 208.

Sec. 185 (1043). Gambling; keeper of tavern or liquor-shop, allowing games to be played in his house, guilty of a misdemeanor. R. C., c. 34, s. 76. 1799, c. 526. 1801, c. 581. 1831, c. 26.

If any keeper of an ordinary, or house of entertainment, or of a house wherein liquors are retailed, shall knowingly suffer any game, at which money or property, or anything of value, is bet, whether the same be in stake or not, to be played in any such house, or on any part of the premises occupied therewith; or shall furnish persons so playing or betting with drinks or other thing for their comfort or subsistence during the time of play, he shall be guilty of a misdemeanor, and fined not less than ten dollars, and be imprisoned not more than thirty days.

PUNISHMENT.—Punishment by a fine of \$2,000 and imprisonment for thirty days for keeping a gamblinghouse in a building where liquors are retailed, is not excessive. Miller, 94-905.

PART OF HOUSE NOT UNDER LANDLORD'S CONTROL.—A tavern-keeper can not be convicted under this statute, where it appears that the room in which the game took place was a part of the house which had been let by the month for a shoe-shop, and was not under the control of the landlord. Keisler, 51 (6 Jones), 73.

Sec. 186 (1044). Gambling; faro-banks and tables prohibited. R. C., c. 34, s. 71. 1848, c. 34. 1856-'7, c. 25.

If any person shall open, establish, use, or keep a faro-bank, or a faro-table, with the intent that games of chance may be played thereat, or shall play or bet thereat any money, property, or thing

of value, whether the same be in stake or not, he shall be guilty of a misdemeanor and fined at least two hundred dollars and imprisoned not less than three months.

Sec. 187 (1045). Gambling; gaming-tables of every kind prohibited. R. C., c. 34, s. 72. 1791, c. 336. 1798, c. 502, s. 2.

If any person shall establish, use or keep any gaming-table (other than a faro-bank) by whatever name such table may be called, at which games of chance shall be played, he shall on conviction thereof be fined not less than two hundred dollars, and be imprisoned not less than thirty days; and every person who shall play thereat or thereat bet any money, property or thing of value, whether the same be in stake or not, shall be guilty of a misdemeanor, and any fine imposed on the offender shall not be less than ten dollars.

INDICTMENT.—An indictment under this statute is good, though it fails to state that the offence was committed "unlawfully and willfully." *Distinguishing State v. Simpson*, 73 N. C., 269. *Howe*, 100-449.

Where the indictment charges the keeping of a gaming-table called a "shuffle-board," and the jury finds that defendants kept a public gaming-table called a shuffle-board, and that divers persons played thereat and bet spirituous liquors on the games, but that the games *were not games of chance*, but were games of skill, the verdict negatives the indictment, and defendants must be acquitted. *Bishop*, 30 (8 Ired.), 266.

An indictment which fails to charge that the game played was one of chance, and that it was played at a place or table where games of chance are played, will be quashed. *Norwood*, 94-935.

TEN-PINS.—Ten-pins is not a game of chance, and playing such game is not indictable under this statute. *Gupton*, 30 (8 Ired.), 271.

Sec. 188 (1046). Gambling; person allowing gaming-tables on his premises indictable. R. C., c. 34, s. 73. 1798, c. 502, s. 3. 1800, c. 552.

If any person shall knowingly suffer to be opened, kept or used in his house or any part of the premises occupied therewith, any of the gaming-tables by this chapter prohibited, he shall forfeit and pay to any one who will sue therefor two hundred dollars, and shall also be guilty of a misdemeanor and fined and imprisoned.

DWELLING-HOUSE OR SLEEPING-APARTMENT.—The evidence was that defendant occupied two adjoining rooms in the second story of a building, one of which contained two beds and the other bed-room furniture, and that numerous persons, both by night and day, assembled in these rooms for the purpose of betting money on games of cards played therein; that money was staked on the games, and that defendant, when present, acted as banker in the games of poker: *Held*, that defendant was guilty, and that it was not necessary that it should be alleged or proved that the games played were games of chance, and that the fact that the apartments were used as the dwelling-house or sleeping-chamber of defendant was no defence. *Black*, 94-809.

Sec. 189 (1047). Gambling; lotteries forbidden. R. C., c. 34, s. 69. 1834, c. 19, s. 1. 1874-'5, c. 96.

If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated, or known; or if any person, by such way and means, expose or set to sale any house or houses, real estate, or any goods or chattels, cash, or written evidence of debt, or certificates of claims, or anything of value whatsoever, every person so offending shall be guilty of a misdemeanor, and be fined not exceeding two thousand dollars, or imprisoned not exceeding six months, or both in the discretion of the court. Any person or society, association, company or organization of persons whatsoever, who engage in disposing of any species of property whatsoever, money or evidences of debt, or in any manner distribute gifts or prizes upon tickets or certificates sold for that purpose, shall be held liable to indictment and prosecution under this section.

Defendant sold to customers small boxes of candy of trifling value for the chance of designating with a stick one of certain pictures, behind some of which were small sums of money, and behind others were cards with the letter "C." If the purchaser happened to designate a picture with money behind it, he got the money, if one with the letter "C," he got another box of candy, but the purchaser did not know which of the pictures had money behind them or which had the card: *Held*, that defendant was guilty of maintaining a lottery. *Lumsden*, 89-572.

PURCHASERS OF TICKETS NOT INDICTABLE.—Persons who purchase lottery tickets are not indictable under this section. *Bryant*, 75-207.

CHARTER OF CORPORATION.—A right conferred in the charter of a corporation to dispose of property by means of lottery tickets is not a *contract* between the corporation and the state, but a mere *privilege* or *license*, and may be revoked at the will of the legislature. *Morris*, 77-512.

Sec. 190 (1048). Gambling; sale of lottery tickets forbidden. R. C., c. 34, s. 70. 1834, c. 19, s. 2. 1887, c. 211.

If any person shall sell, barter or dispose of any lottery ticket or order, for any number or shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the state for or on behalf of any such lottery, to be drawn and paid either out of or within the state, such person shall be guilty of a misdemeanor, and punished as in the preceding section. Any one who by writing or printing or by circular or letter or in any other way advertises or publishes an account of a lottery, whether within or without this state, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or how it may be obtained, is guilty of a misdemeanor.

Sec. 191 (1049). Gambling; justices of the peace and other officers directed to destroy gaming-tables. R. C., c. 34, s. 74. 1791, c. 336. 1798, c. 502, s. 2.

All justices of the peace, sheriffs, constables, and other officers of police, are hereby authorized and directed, on information made to them on oath, that any gaming-table prohibited to be used by this chapter, is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect their destruction.

Sec. 192 (1050). Gambling; justices and other judicial officers authorized to summon witnesses touching the whereabouts of gaming-tables. 1858-'9, c. 34, s. 1. 1889, c. 355.

All justices of the peace, intendants and magistrates of police, mayors of towns, and judges of the supreme or superior court, who shall have good reason to believe that any person within their jurisdictions* has knowledge of the existence and establishment of any faro-bank or faro-table, or gaming-tables or places where intoxicating liquors are sold contrary to law, prohibited by this chapter, in any town or county within their several jurisdictions, and such persons not being minded to make voluntary informations thereof on oath, then it shall be lawful for such justices of the peace, intendant and magistrate of the police, mayor of town, or judge of supreme or superior court, to issue to the sheriff of the county, or any constable of the town or township in which said faro-bank or faro-table, or gaming-table or tables, or places where intoxicating liquors are sold contrary to law, are supposed to be, a subpoena *capias ad testificandum*, or summons in writing, commanding such person to appear immediately before said justice of the peace, intendant or magistrate of police, mayor or judge, and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of said gaming-table or tables, faro-bank or faro-tables, or places where intoxicating liquors are sold contrary to law, and the names and personal description of the keepers thereof; and such evidence when obtained shall be considered and held in law as an information on oath, and said justice, intendant, magistrate or mayor or judge, may thereupon proceed to seize and arrest said keepers and destroy said tables, or issue process therefor, in like manner as they may by authority of the preceding section.

Sec. 193 (1051). Gambling; money or property bet at any prohibited game liable to be seized. R. C., c. 34, s. 77. 1798, c. 502, s. 3.

All moneys, or other property or thing of value exhibited for the purpose of alluring persons to bet at any prohibited game, or

actually staked or bet on such game, shall be liable to be seized by any justice of the peace, or by any person acting under his warrant. All the moneys or other property or thing which shall be so seized, shall belong one-half to the person seizing them and the other half to the use of the poor.

Sec. 194 (1052). Gambling; persons opposing destruction of gaming-tables or seizure of moneys staked on forbidden games, how punished. R. C., c. 34, s. 78. 1798, c. 502, s. 4.

If any person shall oppose the destruction of any prohibited gaming-table, or the seizure of any moneys, property, or other thing staked on forbidden games, or shall take and carry away the same or any part thereof after seizure, he shall forfeit and pay to the person so opposed one thousand dollars, for the use of the state and the person so opposed; and shall, moreover, be guilty of a misdemeanor.

Sec. 195. Gambling; unlawful whether property in stake or not. 1891, c. 29.

It shall be unlawful for any person to play at any game of chance at which money, property or other thing of value is bet, whether the same be in stake or not, and those who play and those who bet thereon shall be guilty of a misdemeanor.

The game known as "ten-pins," like its kindred English game of "bowls," is not a game of chance within the meaning of this statute. King, 113-631.

An allegation that defendants did unlawfully and willfully play at a game of cards at which money was bet sufficiently describes a game of chance. Taylor, 111-680.

This statute does not prohibit social diversions in which the hostess offers prizes for the most successful or least successful player at cards or other games, for, though the games are games of chance, the players bet nothing. DeBoy, 117-702.

This statute does not apply to the prevailing custom of "shooting for beef," and other similar trials of skill, for which the participant pays for the "chance" or privilege of shooting, there being no chance in the sense of the acts against gambling. DeBoy, 117-702.

One who gets up a raffle or throws dice for those who engage in it is liable as a principal. DeBoy, 117-702.

Where several parties each put up a piece of money and then decide, by throwing dice, who shall have the aggregate sum or "pool," the game is one of chance, and the fact that the aggregate sum is exchanged for a turkey and the transaction is denominated a "raffle" does not change the character of the game. DeBoy, 117-702.

An infant under fourteen years of age, who played at a game of chance called "shooting craps," well-knowing the difference between right and wrong, but who did not know the act was unlawful, is not indictable for gambling. Yeargan, 117-706.

Sec. 196. Gambling at agricultural fairs. 1891, c. 209.

All games of chance, wheels of fortune and gambling of all species at any fair are hereby forbidden.

For the purpose of enforcing this act all parties who may lose money by gambling at any of these games of chances, wheels of fortune or other gambling devices at any fair chartered under the laws of North Carolina, shall have an action against the officers of said fair to receive [recover] the amount lost: *Provided*, that the officers licensed the gambling or knew that it was carried on; an equal amount and all costs shall also be received [recovered] for the public school fund upon presentment by the grand jury and conviction.

It shall be the duty of the grand jury to present the officers of such fairs whom they have reason to believe have violated this law. In all cases where the party or parties who have lost money by these gambling operations do not present or indict the officers of the fair and they are convicted, then the money collected from them shall go to the public school fund.

Sec. 197 (2717). Betting on elections. 1858-'9, c. 49.

Any person who shall bet or wager any money or other thing of value upon any election held in this state shall be guilty of a misdemeanor.

GINSENG.

Sec. 198 (1053). Ginseng, penalty for digging between April and September. 1866-'7, c. 60.

Any person digging ginseng between the first day of April and the first day of September, shall forfeit and pay the sum of ten dollars for each day or part of a day's digging, and shall also be guilty of a misdemeanor: *Provided*, that no man shall be prevented from destroying ginseng upon his own premises.

GRAVES AND GRAVE-YARDS.

Sec. 199. Graves; opening unlawfully a felony. 1885, c. 90.

Any person who shall, without due process of law, or the consent of the surviving husband or wife, or the next of kin of the

deceased, and of the person having control of such grave, open any grave for the purpose of taking therefrom any such dead body, or any part thereof buried therein, or anything interred therewith, shall be deemed guilty of a felony, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court.

Sec. 200. Private grave-yards, unlawful to remove anything from. 1889, c. 130.

It shall be unlawful for any person to take away any stone, brick, iron or anything that encloses private grave-yards. Any person violating this act shall be deemed guilty of a misdemeanor, and on conviction shall be fined not more than ten dollars or imprisoned not more than thirty days.

On the trial of several defendants charged with an offence, upon an intimation from the court as to the law and an indication from the counsel for the defendants that they would not argue the case to the jury except as to the guilt of two of them, the solicitor stated that he would consent to a verdict of not guilty as to such two defendants. The defendants' counsel, after consultation, then stated that they would argue the case as to the others, whereupon the solicitor withdrew his proposition as to the verdict concerning the two defendants: *Held*, that it was proper for the judge to refuse to direct a verdict of not guilty as to the two defendants. McLean, 121-589.

The opening of a grave for the purpose of removing anything interred therein is conclusive as to the intent with which the act was done, and the intent to do the act is the criminal intent which imparts to it the character of an offence. McLean, 121-589.

Where an act forbidden by law is intentionally done the intent to do the act is the criminal intent which imparts to it the character of an offence. McLean, 121-589.

At a meeting of the commissioners of a town, at which the mayor presided, a report of the cemetery committee was adopted, recommending that, unless parties who had taken lots in the town cemetery and had not paid for them should pay the amount due within sixty days on notice, the bodies buried in such lots should be removed to the free part of the cemetery. Subsequently, in reply to a question of one of the commissioners as to the legal right to remove the bodies, the mayor said, "The way is open; go ahead and remove them": *Held*, that the mayor was individually guilty of counselling, procuring and commanding an act within the meaning of section 977 of The Code, the committing of which afterwards was a felony. McLean, 121-589.

HABEAS CORPUS.

- SEC. 201. In what cases application made.
 SEC. 202. When application denied.
 SEC. 203. By whom application made.
 SEC. 204. Mode of making application.
 SEC. 205. What application must contain.
 SEC. 206. When writ must be granted.
 SEC. 207. Defect of form.
 SEC. 208. When the writ sufficient.
 SEC. 209. Penalty for refusing to grant the writ.
 SEC. 210. Writ may issue without application, when.
 SEC. 211. The return, what to contain.
 SEC. 212. Notice to parties interested.
 SEC. 213. Notice to district solicitor.
 SEC. 214. Production of the body.
 SEC. 215. Attachment for failure to obey the writ.
 SEC. 216. Penalty for refusing attachment.
 SEC. 217. Where a sheriff fails to return.
 SEC. 218. Precept to bring up party detained.
 SEC. 219. Penalty for refusing to grant precept.
 SEC. 220. Penalty for conniving at insufficient return.
 SEC. 221. Power of the county called.
 SEC. 222. Proceedings on the return of the writ.
 SEC. 223. Party to be discharged, when.
 SEC. 224. Party to be remanded, when.
 SEC. 225. To be bailed or remanded, when.
 SEC. 226. Proceedings in case of sickness.
 SEC. 227. Penalty for disobedience to order.
 SEC. 228. Officer liable civilly for disobedience.
 SEC. 229. Penalty for committing for same cause.
 SEC. 230. Penalty for neglect to obey writ.
 SEC. 231. False return a misdemeanor.
 SEC. 232. Penalty for concealing party.
 SEC. 233. Aiders and abettors.
 SEC. 234. When writs returnable.
 SEC. 235. By whom served and manner of service.
 SEC. 236. Persons committed for capital offence, when to be tried or discharged.
 SEC. 237. Subpoenas for witnesses.
 SEC. 238. Costs.
 SEC. 239. Custody and disposition of infants.
 SEC. 240. When custody contested, appeal.
 SEC. 241. Habeas corpus *ad testificandum*.
 SEC. 242. Justices and superior court clerks.
 SEC. 243. Application, what to contain.
 SEC. 244. How writ served.
 SEC. 245. Fees and bond on service.
 SEC. 246. Duty of officers.
 SEC. 247. Prisoner to be remanded.

Sec. 201. (1623). In what cases application may be made. 1868-'9, c. 116, s. 1.

Every person imprisoned or restrained of his liberty within this state, for any criminal or supposed criminal matter, or on any pretence whatsoever, except in cases specified in the succeeding section, may prosecute a writ of *habeas corpus*, according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal to be delivered therefrom.

DEATH OF DEFENDANT PENDING APPEAL, ACTION ABATES.—Where a *habeas corpus* proceeding is instituted by a father to secure the custody of his infant children in the possession of and detained by their grandfather, and the grandfather dies pending appeal, the action abates and cannot be re-

vived against the personal representative, since a personal representative, as such, is not chargeable with the possession and detention of children. *Brown v. Rainor*, 108-204.

In such a case each party is liable for his own costs. *Ib.*

HABEAS CORPUS TO BRING DEFENDANT TO TRIAL.—On indictment for burglary with intent to commit murder, defendant consented to a mistrial and pleaded "guilty of larceny," and judgment was then pronounced sentencing him to the penitentiary: *Held*, that the judgment was erroneous, since his confession of being guilty of the larceny was not a confession of the crime charged against him; but that he was not entitled to be discharged, but the original indictment being still pending against him, he could be taken from the penitentiary by *habeas corpus* and held to answer the original charge. *Queen*, 91-660.

FINDING BILL FOR MURDER NOT CONCLUSIVE AS TO PROBABLE CAUSE.—The finding of a true bill for murder does not deprive the court of the power to investigate the evidence and admit the prisoner to bail, and it is reversible error for the court to refuse to hear the evidence on the ground that the finding of the bill was conclusive of the fact that there was probable cause. *Merrimon, C. J., dissenting. Herndon*, 107-934.

CERTIORARI.—As the statute gives no appeal in such cases, a writ of *certiorari* will be granted. *Herndon*, 107—934.

PROCEDENDO TO ANY JUDGE.—If, upon such *certiorari*, the supreme court reverses and sets aside the judgment of the court below and the proceedings are remanded, no *procedendo* issues to any particular judge, but the petitioner can exercise his statutory right to apply, *de novo*, to any judge authorized to grant the writ of *habeas corpus*. *Herndon*, 107—934.

WITNESS CONVICTED OF MURDER.—One who has been convicted of murder and is under sentence of death is a competent witness, and the solicitor for the state is entitled to a *habeas corpus* to obtain his testimony before the grand jury. *Harris, ex parte*, 73—65.

BURDEN ON THE PETITIONER.—Where, upon the return, it appeared that the petitioners were in custody on a *mittimus*, regular in every way, from a justice of the peace, for failure to give bond for their appearance at next term of the superior court, to answer a criminal charge of which the court had jurisdiction, the detention, nothing else appearing, was clearly legal, and the burden was on the petitioners to show wherein it was illegal, and not upon the state to show that they were lawfully in custody. *Jones*, 113—669.

PRESUMPTION OF INNOCENCE.—The presumption of innocence applies only on a trial, and does not avail to furnish a presumption that the detention of a party on regular process, when the committing officer has jurisdiction, is illegal. *Jones*, 113—669.

Sec. 202 (1624). When the application may be denied. 1868-'9, c. 116, s. 2.

Application to prosecute the writ shall be denied in the following cases:

(1) Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or shall have acquired exclusive jurisdiction by the commencement of suits in such courts;

(2) Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution, issued upon such final order, judgment or decree.

(3) Where any person has willfully neglected, for the space of two whole terms after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a *habeas corpus* in vacation time for his enlargement;

(4) Where no probable ground for relief is shown in the application.

WHEN APPLICATION DENIED.—An application for *habeas corpus* which states that the prisoner was sentenced to a term of imprisonment on his conviction for a certain offence, and is now undergoing said punishment, must be denied. *State v. Brittain*, 92—587.

Where the petition fails to state that the legality of the imprisonment has not already been adjudged upon a prior writ, it will be refused. *Ib.*

Sec. 203 (1625). By whom application may be made. 1868-'9, c. 116, s. 3.

Application for the writ may be made either by the party for whose relief it is intended, or by any person in his behalf.

Sec. 204 (1626). Mode of making the application. 1868-'9, c. 116, s. 4.

Application for the writ shall be made in writing, signed by the applicant:

(1) To any of the justices of the supreme court;

(2) To any one of the superior court judges, either at term time or in vacation.

Sec 205 (1627). What application must contain. 1868-'9, c. 116, s. 5.

The application must state in substance, as follows:

(1) That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known;

(2) The cause or pretence of such imprisonment or restraint, according to the knowledge or belief of the applicant;

(3) If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made;

(4) If the imprisonment or restraint be alleged to be illegal, the application must state in what the alleged illegality consists; and that the illegality of the imprisonment or restraint has not been already adjudged, upon a prior writ of *habeas corpus*, to the knowledge or belief of the applicant;

(5) The facts set forth in the application must be verified by oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits.

Sec. 206 (1628). When the writ must be granted. 1868-'9, c. 116, s. 6.

Any court or judge empowered to grant the writ, to whom such application may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this chapter, prohibited from prosecuting the writ.

Sec. 207 (1629). Defect of form. 1868-'9, c. 116, s. 7.

No writ of *habeas corpus* shall be disobeyed on account of any defect of form.

Sec. 208 (1630). When the writ sufficient. 1868-'9, c. 116, s. 8.

It shall be sufficient:

(1) If the person having the custody of the party imprisoned or restrained be designated either by his name of office, if he have any, or by his own name, or if both such names be unknown or uncertain, he may be described by an assumed appellation, and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name, or description, or to another person;

(2) If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person intended.

Sec. 209 (1631). Penalty for refusal to grant the writ. 1868-'9, c. 116, s. 9.

If any judge authorized by this chapter to grant writs of *habeas corpus* shall refuse to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars.

Sec. 210 (1632). Writ may issue without application, when. 1868-'9, c. 116, s. 10.

Whenever the supreme or superior court, or any judge of either, shall have evidence from any judicial proceeding before such court or judge, that any person within this state is illegally imprisoned or restrained of his liberty, it shall be the duty of said court or judge

to issue a writ of *habeas corpus* for his relief, although no application be made for such writ.

Sec. 211 (1633). The return and what to contain. 1868-'9, c. 116, s. 11.

The person or officer on whom the writ is served, must make a return thereto in writing, and, except where such person shall be a sworn public officer, and shall make his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally—

(1) Whether he have or have not the party in his custody or under his power of restraint;

(2) If he have the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large;

(3) If the party be detained by virtue of any writ, warrant or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge, before whom the same is returnable;

(4) If the person or officer upon whom such writ is served, shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place.

Sec. 212 (1634). Notice to parties interested. 1868-'9, c. 116, s. 12. 1870-'1, c. 221, s. 1.

When it appears from the return to the writ that the party named therein is in custody on any process, or by reason of any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge, until it shall appear that the person so interested or his attorney, if he have one, shall have had reasonable notice of the time and place at which such writ is returnable.

Sec. 213 (1635). Notice to district solicitor. 1868-'9, c. 116, s. 13.

When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ shall have been returned, or shall be made returnable, be given to the district solicitor of the county in which the person prosecuting the writ is detained.

If it appears from the return that the petitioner is detained on a criminal charge the court may continue the hearing for a reasonable time to give the solicitor an opportunity to examine into the case. Jones, 113—669.

Sec. 214 (1636). Production of the body. 1868-'9, c. 116, s. 14.

If the writ require it, the officer or person on whom the same has been served shall also produce the body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided.

Sec. 215 (1637). Attachment on failure to obey the writ 1868-'9, c. 116, s. 15.

If the person or officer on whom any writ of *habeas corpus* shall have been duly served shall refuse or neglect to obey the same by producing the body of the party named or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse be shown for such refusal or neglect, it shall be the duty of the court or judge before whom the writ shall have been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the sheriff of any county within this state, and commanding him forthwith to apprehend such person or officer and bring him immediately before such court or judge, and on being so brought such person or officer shall be committed to close custody in the jail of the county where such court or judge may be, without being allowed the liberties thereof, until such person or officer make return to such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ shall have been issued.

Sec. 216 (1638). Penalty for refusing attachment. 1870-'1, c. 221, s. 2.

If any judge shall willfully refuse to grant the writ of attachment, as provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Sec. 217 (1639). Where a sheriff fails to return. 1868-'9, c. 116, s. 16.

If a sheriff shall have neglected to return the writ agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own.

Sec. 218 (1640). Precept to bring up party detained. 1868-'9, c. 116, s. 17.

The court or judge by whom any such attachment may be issued, may also at the same time, or afterwards, direct a precept to any sheriff, coroner or other person to be designated therein, commanding him to bring forthwith, before such court or judge, the party, wherever to be found, for whose benefit the writ of *habeas corpus* has been granted.

Sec. 219 (1641). Penalty for refusing to grant the precept. 1870-1, c. 221, s. 3.

If any judge shall refuse to grant the precept provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Sec. 220 (1642). Penalty for conniving, etc., at any insufficient return, etc. 1870-1, c. 221, s. 4.

If any judge shall grant the attachment, or the precept, and shall give the officer or other person charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law; or shall connive at the failing to make any return or any evasive or insufficient return, or any return other than that provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Sec. 221 (1643). Power of the county. 1868-'9, c. 116, s. 18.

In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, as in other cases.

Sec. 222 (1644). Proceedings on the return of the writ. 1868-'9, c. 116, s. 19.

The court or judge before whom the party is brought on a writ of *habeas corpus*, shall, immediately after the return thereof examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same shall have been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to

justice shall appertain in delivering, bailing or remanding such party.

Sec. 223 (1645). Party to be discharged, when. 1868-'9, c. 116, s. 20.

If no legal cause be shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appear on the return to the writ, that the party is in custody by virtue of civil process from any court legally constituted, or issued by an officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

- (1) Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person;
- (2) Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged;
- (3) Where the process is defective in some matter of substance required by law, rendering such process void;
- (4) Where the process, though in proper form, has been issued in a case not allowed by law;
- (5) Where the person, having the custody of the party under such process, is not the person empowered by law to detain him;
- (6) Where the process is not authorized by any judgment, order or decree by any court, nor by any provision of law.

Sec. 224 (1646). Party to be remanded, when. 1868-'9, c. 116, s. 21.

It shall be the duty of the court or judge forthwith to remand the party, if it appear that he is detained in custody, either,

- (1) By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction;
- (2) By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree;
- (3) For any contempt specially and plainly charged in the commitment by some court, officer or body, having authority to commit for the contempt so charged;
- (4) That the time during which such party may be legally detained has not expired.

Sec. 225 (1647). Party to be bailed or remanded, when. 1868-'9, c. 116, s. 22.

If it appear that the party has been legally committed for any criminal offence, or if it appear by the testimony offered with the

return of the writ, or upon the hearing thereof, that the party is guilty of such an offence, although the commitment be irregular, the court or judge shall proceed to let such party to bail, if the case be bailable and good bail be offered; if not, the court or judge shall forthwith remand such party to the custody or place him under the restraint from which he was taken: *Provided*, the person or officer, under whose custody or restraint he was, be legally entitled thereto; if not so entitled the court or judge shall commit such party to the custody of the officer or person legally entitled thereto.

Sec. 226 (1648). Proceedings in case of sickness of the party. 1868-'9, c. 116, s. 23.

Whenever, from the illness or infirmity of the person directed to be produced by a writ of *habeas corpus*, such person can not, without danger, be brought before the court or judge, where the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ; and if the court or judge be satisfied of the truth of the allegation and the return be otherwise sufficient the court or judge shall proceed to decide on such return and to dispose of the matter in the same manner as if the body had been produced.

Sec 227 (1649). Penalty for disobedience to order of discharge. 1868-'9, c. 116, s. 24.

Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this chapter, may be enforced by the court or judge by attachment in the same manner and with the same effect as for a neglect to make return to a writ of *habeas corpus*; and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five hundred dollars, besides any special damages which such party may have sustained.

Sec. 228 (1650). Officer not liable civilly for obedience. 1868-'9, c. 116, s. 25.

No officer or other person shall be liable to any civil action for obeying such judgment or order of discharge.

Sec. 229 (1651). Penalty for committing for same cause. 1868-'9, c. 116, s. 26.

No person who has been set at large upon any writ of *habeas corpus* shall be again imprisoned or detained for the same cause by any person whatsoever other than by the legal order or process of

the court wherein he shall be bound by recognizance to appear or of any other court having jurisdiction in the case, under the penalty of two thousand five hundred dollars to the party aggrieved thereby; and every officer or other person who shall knowingly offend against this section shall be guilty of a misdemeanor.

Sec. 230 (1652). Penalty for neglecting to obey the writ, or for refusing copy of process. 1868-'9, c. 116, s. 27.

If any person to whom a writ of *habeas corpus* is directed, shall neglect or refuse to make due return thereto, or to bring the body of the party detained according to the command of the writ without delay; or shall not, within six hours after demand made therefor, deliver a copy of the commitment or cause of detainor, such person shall, upon conviction by indictment, be fined one thousand dollars, or imprisoned not exceeding twelve months, and if such person be an officer, shall moreover be removed from office.

Sec. 231 (1653). False returns a misdemeanor. 1868-'9, c. 116, s. 28.

Every person making a false return to a writ of *habeas corpus*, shall be guilty of a misdemeanor.

Sec. 232 (1654). Penalty for concealing party. 1868-'9, c. 116, s. 29.

Any one having in his custody, or under his power, any party, who, by this chapter, would be entitled to a writ of *habeas corpus*, or for whose relief such writ shall have been issued, who shall, with intent to elude the service of such writ or to avoid the effect thereof, transfer the party to the custody, or put him under the power or control of another, or shall conceal or change the place of his confinement, shall be guilty of a misdemeanor.

Sec. 233 (1655). Aiders and abettors. 1868-'9, c. 116, s. 30.

Every person who shall knowingly aid or abet in the violation of the preceding section, shall be guilty of a misdemeanor.

Sec. 234 (1656). Writs returnable, when. 1868-'9, c. 116, s. 31.

Writs of *habeas corpus* may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein.

Sec. 235 (1657). By whom served, and manner of service. 1868-'9, c. 116, s. 32.

The writ of *habeas corpus* may be served by any qualified elector of this state, thereto authorized by the court or judge allowing the

same. It may be served by delivering the writ, or a copy thereof to the person to whom it is directed; or, if such person can not be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer or other person of proper age; or, if none such can be found, or if the person attempting to serve the writ be refused admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling-house of the party to whom the writ is directed, or of the place where the party is confined for whose relief it is sued out.

Sec. 236 (1658). Persons committed for capital offences, when to be tried or discharged. 1868-'9, c. 116, s. 33.

When any person who has been committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer in open court to be brought to his trial, shall not be indicted some time in the next term of the superior or criminal court ensuing such commitment, the judge of the court, upon notice in open court on the last day of the term, shall set at liberty such prisoner upon bail, unless it appear upon oath that the witnesses for the state could not be produced at the same term; and if such prisoner, upon his prayer as aforesaid, shall not be indicted and tried at the second term of the court, he shall be discharged from his imprisonment.

Sec. 237 (1659). Subpœnas for witnesses. 1868-'9, c. 116, s. 34.

Any party to a proceeding on a writ of *habeas corpus* may procure the attendance of witnesses at the hearing, by subpœna, to be issued by the clerk of any superior court, under the same rules, regulations and penalties prescribed by law in other cases.

Sec. 238 (1660). Costs. 1868-'9, c. 116, s. 35.

The costs on a writ of *habeas corpus* may be awarded at the discretion of the court or judge who shall hear the same; and he may direct what officer shall tax such costs; and execution may issue therefor as in other cases.

Sec. 239 (1661). Custody and disposition of infants in certain cases. 1858-'9, c. 53. 1868-'9, c. 116, s. 36.

When a contest shall arise on a writ of *habeas corpus* between any husband and wife, who are living in a state of separation, without being divorced, in respect of the custody of their children, the court or judge, on the return of such writ, may award the charge

or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of the court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same.

Sec. 240 (1662). When custody of children contested, either party may appeal. 1858-'9, c. 53, s. 2.

In all cases of *habeas corpus*, where a contest shall arise in respect to the custody of minor children, either party may appeal to the supreme court from the final judgment.

Sec. 241 (1663). *Habeas corpus ad testificandum*. 1868-'9, c. 116, s. 37.

Every court of record shall have power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of *habeas corpus*, for the purpose of bringing before the said court any prisoner, who may be detained in any jail or prison within the state, for any cause, except such prisoner be under sentence for a felony, to be examined as a witness in such suit or proceeding, in behalf of the party making the application.

Sec. 242 (1664). Justices of the peace and superior court clerks. 1868-'9, c. 116, s. 38.

Such writ of *habeas corpus* may be issued by any justice of the peace or clerk of the superior court upon application as provided in the preceding section, to bring any person confined in the jail or prison of the same county where such justice or clerk may reside, to be examined as a witness before such justice or clerk. And in cases where the testimony of any prisoner is needed in a proceeding before a justice of the peace, or a clerk, and such person be confined in a county in which such justice or clerk does not reside, application for a *habeas corpus* to testify may be made to any judge of the supreme or superior court.

Sec. 243 (1665). Application, what to contain. 1868-'9, c. 116, s. 39.

The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant, and shall state:

(1) The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired;

(2) That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes.

Sec. 244 (1666). Writ, how and by whom served. 1868-'9, c. 116, s. 40.

The writ of *habeas corpus* to testify shall be served by the same person, and in like manner in all respects, and enforced by the court or officer issuing the same as prescribed in this chapter for the service and enforcement of the writ of *habeas corpus cum causa*.

Sec. 245 (1667). Fees and bond on service. 1868-'9, c. 116, s. 41.

The service of the writ shall not be complete, however, unless the applicant for the same shall tender to the person in whose custody the prisoner may be, if such person be a sheriff, coroner, constable or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he shall also give bond, with sufficient security, to such sheriff, coroner, constable or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner.

Sec. 246 (1668). Duty of officers. 1868-'9, c. 116, s. 42.

It shall be the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ be directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same shall have been issued the sum of five hundred dollars.

Sec. 247 (1669). Prisoner to be remanded. 1868-'9, c. 116, s. 43.

After having testified the prisoner shall be remanded to the prison from which he was taken.

HIGHWAYS.

See **ROADS.**

HOGS.

Sec. 248. Hogs having cholera not to run at large. 1889, c. 173. 1891, c. 67.

Any person having swine affected with the disease known as hog cholera, and discovering the same, or to whom notice of the fact shall be given, shall immediately secure the diseased swine from the approach or contact with other hogs not so affected, by penning or otherwise securing and effectually isolating them.

When any hog or other animal shall die with the hog cholera or other infectious disease, it shall be the duty of the owner thereof to so bury the same as to secure it from the reach or contact with other hogs or other domestic animals of value, and he shall not throw or place such hog or other animal in any ditch, canal, branch, creek, river or other water-course passing beyond his own premises.

Any person violating the provisions of this act or neglecting for five days after it shall come to his or their notice that the swine are affected, and failing to comply with this act, shall be guilty of a misdemeanor and fined not exceeding five dollars or imprisoned not more than ten days, and such swine shall be so penned or confined that they shall not have any access to any ditch, canal, branch, creek, river or other water-course which passes beyond the premises of the owners of such swine.

HOLIDAYS.

COURT MAY SIT DURING HOLIDAYS.—Code N. C., sections 3782-3784, declaring certain days public holidays, do not prevent the courts from proceeding with the usual business before them. Moore, 104—743.

HOMICIDE.

SEC. 249. Murder divided into two degrees.

SEC. 250. Punishment for murder:

1. Murder in First Degree.
2. Murder in Second Degree.
3. Premeditation and Deliberation.
4. Degree Depends on the Facts.
5. Manslaughter.
6. Excusable Homicide.
7. Charge.
8. Evidence.
9. Character of the Deceased.
10. Threats.
11. Killing by Officer.
12. Cooling-Time.
13. Malice.
14. Provocation.
15. Murder—Decisions Prior to 1893.
16. Intoxication.
17. Indictment.
18. Miscellaneous Questions.

MURDER.

Sec. 249. Murder divided into two degrees and defined. 1893, c. 85. 1893, c. 281.

SECTION 1. All murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death.

SEC. 2. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the penitentiary.

SEC. 3. Nothing herein contained shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree.

SEC. 4. The provisions of this act shall not apply to any crime which shall have been committed prior to the ratification of this act, and shall not affect the existing distinction between murder and manslaughter nor the punishment for manslaughter as now provided by law.

Sec. 250 (1057). Homicide, murder, its punishment. 1868-'9, c. 167, s. 1. R. C., c. 34, s. 2. 1 Edw. VI., c. 12, s. 10. 23 Hen. VIII., c. 1, s. 3. 25 Hen. VIII., c. 3. 8 Eliz., c. 4. 18 Eliz., c. 7, s. 1.

Every person who is convicted, in due course of law, of any wilful murder of malice prepense, shall suffer death.

1. MURDER IN FIRST DEGREE.

Where the prisoner weighs the purpose of killing long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or how

remote, puts it into execution, there is sufficient premeditation and deliberation to warrant a verdict of guilty of murder in the first degree. *Dowden*, 118—1145.

The rule that where the killing with a deadly weapon is admitted or proven malice is presumed, and it devolves upon the prisoner to show facts in extenuation, mitigation or excuse, applies to murder in the second degree but not in the first. *Locklear*, 118—1154.

It was admitted that one J killed the deceased, and it appeared in evidence that, just prior to the killing, the defendants went with J to the house of the deceased where J, in the presence and hearing of the defendants, cursed and threatened the life of the deceased's wife; that then J went into the house, got two guns of the deceased, carried them to the kitchen, met the deceased at the gate and in the sight and hearing of the defendants shot and killed the deceased as the latter approached the gate; that the defendants made no attempt, by word or act, to prevent the killing, made no outcry, but, without saying anything, walked away with J; that a short time before the killing a witness had a conversation with the defendants, and one of them said that J had sent for deceased to come over and compromise a difficulty between the latter and J and that J had loaded his gun and was going to shoot deceased if he did not settle; that one of the defendants asked witness for cartridges for his pistol, saying, "I am afraid we are going to have trouble with J to-day;" that on the day of the killing J came to the house of defendant F without a gun, and the two men went away together, and in twenty minutes witness heard two guns fired at deceased's house, and when they came back J said he had killed deceased and witness remarked, "If deceased is killed it will go hard with all of you": *Held*, that the evidence was not only sufficient to sustain a verdict for murder in the second degree, but in the first degree, as the jury might have been justified in finding that defendants were present aiding and abetting J. *Freeman*, 122—1013.

The deceased, hearing a quarrel between one of his employes and the prisoner, in the night time, went to where they were, when the prisoner stopped and went off a few feet. Deceased approached the prisoner and asked him if he was the man who had been quarrelling with the employe, to which the prisoner made no reply. Deceased then placed his hand on the prisoner's shoulder and asked him to come to the light and tell what the trouble was about, when the prisoner immediately stabbed deceased, and jumped back, crying "Hands off": *Held*, that the evidence was not sufficient to be submitted to the jury on the question of murder in the first degree. *Rhyne*, 124—.

The evidence was that the accused and deceased had quarreled and that the latter had made threats, and the only evidence as to the manner of killing was that the accused had concealed himself and waylaid the deceased, striking him as he passed on the head with an axe killing him instantly. The court charged that the crime was murder or nothing, and the jury found the accused guilty of the felony and murder in the manner and form charged in the indictment. The indictment was in the form authorized by the act of 1837: *Held*, that, upon the evidence, only a verdict of guilty in the first degree was warranted, and the general verdict was in response to the charge of murder in the first degree and determined the degree in accordance with the act of 1893. *Gilchrist*, 113—673.

Where the bill charges murder in the first degree, it being in the power of the jury to convict of murder in the first or second degree or of manslaughter, it is as if there were three counts in the bill, and it is settled that, where there are various counts in an indictment, and testimony is offered as to one count only, and there is a general verdict of guilty, the verdict will be presumed to have been rendered upon the count to which the evidence was applicable. *Gilchrist*, 113—673.

The failure of the judge to explain to the jury the application of the testimony to the theory of murder in the second degree is error. *Thomas*, 118—1113.

It appeared that the defendant had gone to the house of the deceased in the evening, armed; that he had, in conversation with the deceased, shown two pistols; had remained until 2 o'clock, when the deceased was shot. That there was no quarrel immediately before the shooting. That when he fired he said, "I guess that will do you"; laid one of his pistols beside the deceased, and remarked, "I reckon you will let me alone now": *Held*, it was not error to submit the question of defendant's guilt of murder in the first degree to the jury. *McCormac*, 116—1033.

The pushing of a pin down an infant's throat, whereby death ensues, is killing with a deadly weapon, and if done deliberately and with the purpose of killing is murder in the first degree. *Norwood*, 115—789.

2. MURDER IN SECOND DEGREE.

There was evidence tending to prove that the prisoner stood behind a tree and shot the deceased. There was also evidence that the deceased had a gun beside him when his body was found, and the report of more than one gun was heard about the time it was supposed deceased was shot: *Held*, that the evidence did not warrant an instruction that there was no evidence from which the jury could bring in a verdict of murder in the second degree. *Locklear*, 118—1154.

The evidence was that witness and the deceased were standing on opposite sides of the fence engaged in conversation, when the prisoner approached and told deceased he wished to see him a minute, to which deceased replied, "Come on and see me now"; thereupon witness turned to go into the house, and as she did so, she heard prisoner say, "What you put your hand back there for?" then she heard a noise like running, and then a pistol fired and a body fall, after which she heard some one running off. Deceased was found next morning near the spot with a bullet hole in his breast: *Held*, that the court properly instructed the jury that the prisoner was guilty of murder or nothing. *Cox*, 110—503.

Where the bill charges murder on the 9th of February, 1893, prior to the ratification of the act of February 11th, 1893, dividing murder into two degrees, and the evidence was that the killing was "on a Thursday night" in that month, and the 9th was Thursday, but there were two Thursdays in that month preceding and two succeeding the 9th, it will be assumed, *in favorem vitæ*, that the crime was committed after the ratification of the act. *Gilchrist*, 113—673.

When it appeared that in a mutual affray and an unequal contest between the deceased, who was unarmed, and the two defendants, one of the latter threw deceased to the ground and held him there while the other procured an axe and crushed his skull, it was not error to instruct the jury that defendants were guilty of murder, the circumstances of the holding by one and the hitting by the other defendant being inconsistent with the legal conception of a killing in the heat of passion engendered in an encounter. *Coley*, 114—879.

3. PREMEDITATION AND DELIBERATION.

PREMEDITATION.—No particular time is necessary to constitute premeditation and deliberation. *Fuller*, 114—885. *Rollins*, 113—722.

The mental process may require but a moment of thought. *Thomas*, 118—1113.

The law lays down no rule as to the time which must elapse between the moment when the person premeditates, or reaches the determination to kill, and the moment when he does the killing. Dowden, 118—1145.

The jury may find premeditation no matter how soon after resolving to do so the killing is done. Norwood, 115—789.

The want of provocation, the preparation of a weapon, or the fact that there was no quarrel just before the killing, may be treated as some evidence of premeditation. McCormac, 116—1033.

The use of a weapon likely to produce death raises a presumption of malice only, and not of premeditation and deliberation. Fuller, 114—885.

Where the judge, in defining the two degrees of murder, inadvertently instructed the jury that the fact of killing with a deadly weapon, when admitted, raised the presumption or justified the inference that there was premeditation, instead of malice, it was an erroneous instruction that could not be cured by any subsequent proposition that did not clearly remove from the minds of the jury the impression created by such instruction. Fuller, 114—885.

If the purpose to kill has been deliberately formed the interval which elapses before its execution is immaterial. McCormac, 116—1033.

In order to constitute deliberation and premeditation something more must appear than the prior existence of actual malice, or the presumption of malice which arises from the use of a deadly weapon. Though the mental process may require but a moment of thought, it must be shown, so as to satisfy the jury beyond a reasonable doubt, that the prisoner weighed and balanced the subject of killing in his mind long enough to consider the reason or motive which impelled him to the act, and to form a fixed design to kill in furtherance of such purpose or motive. Thomas, 118—1113.

Premeditation is thought beforehand for any length of time, however short. Thomas, 118—1113.

A special prayer for instruction that "to convict of murder in the first degree the prisoner must have used the same degree of deliberation and premeditation as would have been used if he had killed the deceased with starvation," etc., is properly refused. Booker, 123—713.

Where the circumstances of the killing do not bring it within the classes which by the statute are made *per se* murder in the first degree, the state must prove deliberation and premeditation, but this it may do circumstantially, and not by express and positive evidence. Booker, 123—713.

The intent to kill in other degrees of unjustifiable homicide, but to constitute murder in the first degree that intent must be formed into a *fixed purpose* by deliberation and premeditation. Thomas, 118—1113.

The statute simply divides murder into two classes; murder with a *specific deliberate intent* to take life being murder in the first degree; murder without such intent, being murder in the second degree. Thomas, 118—1113.

Where a husband beat his wife and she died in consequence—her neck being broken somehow in the scuffle—and during the beating the husband said he would "take something and kill her," but in fact used no deadly weapon, the use of the expression under the circumstances is not evidence of such a specific premeditated intent to take life as will constitute murder in the first degree. Thomas, 118—1113.

It is not necessary that the prosecution in order to show *prima facie* premeditation and deliberation, should offer evidence tending to prove a pre-conceived purpose to kill formed at a time anterior to the meeting when it was carried into execution. McCormac, 116—1033.

In order to warrant submitting the question of defendant's guilt in the first degree it must appear in some aspect of the evidence that defendant deliberately determined to kill the deceased before inflicting the mortal wound. McCormac, 116—1033.

4. DEGREE DEPENDS UPON THE FACTS.

It is not in the discretion of the jury to render a verdict of murder in the first or second degree, since the degree depends upon the facts as the jury find them to be, applying the law thereto as laid down by the court. Freeman, 122—1013.

FLIGHT.—While flight may be evidence of guilt, it cannot be evidence of the degree of the crime. Rhyne, 124—847.

5. MANSLAUGHTER.

Sec. 244 (1055). Homicide, manslaughter, punishment therefor. 1879, c. 255. R. C., c. 34, s. 24. 4 Hen. VII., c. 13. 1816, c. 918.

Every person who shall commit the crime of manslaughter shall be punished by imprisonment in the county jail or penitentiary not less than four months nor more than twenty years.

Sec. 245 (1056). Homicide, manslaughter, punishment for second offence. R. C., c. 34, s. 25.

Every person who, having been convicted of the crime of manslaughter and sentenced thereon, shall be convicted of a second crime of like nature, shall be imprisoned in the penitentiary not less than five nor more than sixty years; and in every such case of conviction for such second offence, the prior conviction of the same person and sentence thereon may be shown to the court.

INDICTMENT FOR MANSLAUGHTER.—An indictment for manslaughter in the following words is sufficient: "The jurors for the state on their oaths present that A. B., in the county of E., did feloniously kill and slay C. D." Such form contains "every averment necessary to be proved" as required by section 247. Arnold, 107—861.

The act of 1887 (The North Carolina Criminal Code and Digest, section 247), prescribing the form of indictment for murder and manslaughter, is not in conflict with any provision of the constitution of this state. Moore, 104—743.

WHAT CONSTITUTES MANSLAUGHTER.—Deceased took hold of a bridle-rein of a horse on which the prisoner was mounted, and held it forcibly for from ten to forty-five minutes, in spite of the efforts of the prisoner to loosen the rein, and the prisoner, at the end of that time, struck the deceased with a gallon jug of molasses, which he casually had in his hands, several violent blows, the first of which knocked the deceased down, and death ensued from these blows: *Held* to be manslaughter, and not murder. Ramsey, 50 (5 Jones), 195.

The prisoner looking through a crack in his own house, saw deceased with his arms around the neck of the prisoner's wife, and thereupon entered the house when deceased came at him with a knife and the prisoner killed him: *Held*, that prisoner was guilty only of manslaughter. Harman, 78—515.

While defendant and others were engaged in friendly conversation the deceased, a powerful man, came up on horseback in a gallop, hallooing twice and applying an insulting epithet to his horse, which defendant misinter-

puted as applicable to himself; a demand for explanation by the defendant was followed by an insult from the deceased, who advanced with threatening aspect and words upon the defendant, who retreated until overtaken and knocked or pushed down by deceased, and while upon the ground, and during the struggle, inflicted nine cuts or stabs with a pocket knife, from which deceased died: *Held*, that the repeated cutting of deceased, resulting in death, was not murder, since there was no evidence of express malice or of a previous preparation for the fight by the defendant, or that he used the knife after deceased had been taken off his prostrate body, but such killing, being the result of passion produced by the fight, was manslaughter at the most. *Miller*, 112—878.

Where one strikes another a violent blow, with a heavy pole pointed with iron, and a fight ensues in which the assailed uses a deadly weapon with which he knocks down his adversary and disables him, yet follows up his blows with great violence and cruelty and kills him, this is but manslaughter on account of the greatness of the provocation in the first instance, and the passion naturally produced by the conflict. *Curry*, 46 (1 Jones), 280.

A person who was violently abused and beaten, made his escape, ran to his own house, eighty yards off, got a knife, ran back, and upon meeting with deceased, stabbed him: *Held*, that he was guilty of manslaughter only. *Norris*, 2 (1 Hay.), 495.

The wife of the deceased threw water on the prisoner, who was standing just out the door, and prisoner struck deceased's wife a violent blow, knocking her down and causing her to faint. Deceased, a powerful and violent man, and known to be such by the prisoner, then advanced on the prisoner, who retreated about twenty paces, and just as deceased was trying to catch the muzzle of prisoner's gun, the prisoner shot and killed him: *Held*, that prisoner was guilty of manslaughter only. *Roberts*, 8 (1 Hawks), 349.

If, upon the whole testimony, it is manifest that the presumption of malice has been rebutted, and in no aspect of the testimony, if believed as a whole, can the prisoner be guilty of murder in the second degree, the court should so instruct the jury and direct them not to convict of a higher offence than manslaughter. *Wilcox*, 118—1131.

The evidence, in a trial for homicide occurring before 1893, showed that the defendant had made threats against the life of the deceased, but that thereafter on the day of the killing their relations were friendly and that the immediate provocation to the homicide was the shooting of defendant's brother by the deceased: *Held*, that the jury should have been instructed that if they found these facts, defendant could be convicted of manslaughter only, inasmuch as, after the reconciliation, the law would presume the crime to be due to the new and sudden provocation and not to the previous malice. *Horn*, 116—1037.

As manslaughter may be committed in various ways, and without the use of a deadly weapon, a defendant convicted of manslaughter cannot complain of the failure of the court to instruct the jury whether a stick used was a deadly weapon. *Ussery*, 118—1177.

SPORT.—Where one engaged in an unlawful and dangerous sport kills another by accident it is manslaughter. *Vines*, 93—493. *Shirley*, 64—610. *Roan*, 13 (2 Dev.), 58.

FIGHTING ON EQUAL TERMS AND SUDDEN QUARREL.—If two men fight upon a sudden quarrel, and one kills the other, the chances being equal, this constitutes manslaughter. *Massage*, 65—480.

DEFENDANT NEED NOT SHOW MITIGATION, WHEN.—Where the killing is established, it is incumbent on the prisoner to show circumstances of mitigation or excuse to the satisfaction of the jury, unless the same arise out of the evidence for the prosecution. *Brittain*, 89—481.

And if such proof puts the offence of murder out of the way, the law in this state is that it is still incumbent on the prisoner to show, in like manner, the circumstances of justification; and if he fails to do this the offence is manslaughter. *Ib.*

If two men fight upon sudden quarrel and equal terms, the one upon provocation and the other upon a predetermined intention to kill, the fact that the latter would be guilty of murder if he slew his adversary cannot excuse the former if he should be the slayer. *Ib.*

KILLING BY ACCIDENT THOUGH IN UNLAWFUL SPORT.—Where one engaged in an unlawful and dangerous sport kills another by accident, it is manslaughter; but if the sport is lawful, and not dangerous, it is homicide by misadventure, and the test of responsibility depends upon whether the conduct of the accused was unlawful, or not being so, was so grossly careless or violent as necessarily to imply moral turpitude. *Vines, 93—493.*

OPINION OF WITNESSES.—The opinion of an eye-witness as to whether the fatal blow was accidental or not is incompetent; that is a fact for the jury to determine upon the consideration of all the circumstances connected with the case. *Vines, 93—493.*

Where two persons conspire to kill or inflict grave bodily harm on a third person, and in carrying out the purpose one of them fires a pistol at the third person, who immediately pursues and kills the one who did not fire the pistol, it is manslaughter. *Gaskins, 93—547.*

NO DIFFERENCE WHICH MAKES FIRST ASSAULT.—If two engage in a fight mutually and suddenly, and one kills with a deadly weapon, it is but manslaughter, and ordinarily, it is not material which makes the first assault. *Floyd, 51 (6 Jones), 392.*

6. EXCUSABLE HOMICIDE.

To render the act of killing excusable on the ground of self-defence, the prisoner should have reasonable ground to apprehend, and should actually apprehend, that his life is in danger, or that deceased is about to do him some great bodily harm; but it is for the jury, and not for the prisoner, to judge of the reasonableness of such apprehension. *Rogers, 93—523.*

Though a person may enter into a fight willingly, yet, if in its progress, *he be sorely pressed*, that is, *put to the wall*, so that he must be killed or suffer great bodily harm unless he kill his adversary, and under such circumstances he does kill, it is but *excusable homicide*. *Ingold, 49 (4 Jones), 216.*

Whenever there is a reasonable ground to believe that there is a design to destroy life, to rob or commit a felony, a killing to arrest such design is justifiable. *Harris, 46 (1 Jones), 190.*

Deceased, without any provocation, assaulted the prisoner with a deadly weapon, driving prisoner sixty or eighty steps and then knocking him down. While prostrate on the ground, and while being beaten by deceased with a club, the prisoner shot and killed deceased with a pistol: *Held*, that the killing under such circumstances was not murder in any degree, nor would the killing have been murder if the prisoner had started his ground in the beginning of the assault upon him and then shot deceased, and it was error in the court not to so instruct the jury. *Wilcox, 118—1131.*

Where it appeared that, by the explosion of dynamite under a house, two persons sleeping there were killed; that defendant was overseer of a public road and kept dynamite in his possession for use in making the road; that dynamite was also kept and used by other persons in the neighborhood; that the defendant had been employed by the deceased M, who had dismissed him, and that they had quarrelled about it; that defendant

had been unfriendly with the deceased B, of whose attentions to a widow, to whom defendant had been engaged, he was jealous; that he had said if the deceased and the widow should marry they should never live together in this country; that he and B had "made up," but defendant had said it was only "from the teeth out;" that there were some tracks made by an 8 or 9 shoe on the hillside a few hundred yards from the place of the homicide which was the size of shoe defendant wore; that the day after the homicide the defendant looked pale and nervous: *Held*, that, as the evidence did not exclude every reasonable supposition that it could have been done by some one other than the prisoner, it did not justify the jury in finding a verdict of guilty. Clark and Montgomery, *dissenting*. Gragg, 122—1082.

PREVENTION OF FELONY.—A well-grounded belief that a known felony is about to be committed, will extenuate a homicide committed in *prevention* of the felony, but not a homicide committed in pursuit by an individual of his own accord. Rutherford, 8 (1 Hawks), 457.

7. CHARGE.

On a trial for murder, the confessions of the prisoner having been offered in evidence, their reception was objected to as having been induced by fear or hope, but was allowed. Thereupon the prisoner asked the court to instruct the jury that, "whether confessions are admissible at all as evidence is, as in the case of other evidence, solely a question for the judge, but how far they are to be believed, or whether entitled to credence at all, is a question for the jury." His honor gave the instruction, but added: "But the confessions of the prisoner come before the jury untainted with fear or hope, and are entitled to all the weight to which such evidence is entitled, and the fear or hope which vitiates confessions must be such as to produce an impression that punishment or suffering may be lightened or avoided by confession:" *Held*, that such addition was not objectionable. Rodman and Dick, J. J., *dissenting*. Davis, 63—578.

It is error for the court, when properly requested, to fail to discriminate between a homicide where the prisoner enters into the fight with a deadly weapon prepared beforehand, and one, where being hotly pressed, uses such a weapon on the impulse of the moment, since to ignore such distinction in a proper case is to confound murder and manslaughter. Barnwell, 80—466.

Where the only evidence relied on by the state to connect the prisoner with the offence is his own confessions and those confessions tend to disclose a case of mutual combat upon sudden provocation between the prisoner and deceased, it is error to exclude that view of the case from the jury, however much it may conflict with opposite theories arising from other portions of the evidence. Jones, 79—630.

The evidence was that the prisoner had escaped from the jail the day previous to the homicide, where he had been confined on a charge of larceny; that the deceased, an acting constable and deputy sheriff, went at night with a *posse* to arrest him and sat down in the edge of a path near prisoner's house; that the prisoner came along the path and was commanded by defendant to "halt and give an account of yourself," when he fired and killed deceased; that it was a dark night, but the prisoner could have seen the sheriff's *posse*: *Held*, that it was error to refuse to charge "that if deceased did not make known to prisoner, and prisoner did not know he was an officer, the offence was manslaughter." Alford, 80—445.

The state offered in evidence the declarations of the prisoner "that he had killed him (the deceased) in self-defence, that he had got a gun at

one F's and shot him at C's," and that "he had shot him through and through, and cut his way out; that G (the deceased) and his crowd had waylaid him on the road near Y's, and he had cut his way out:" *Held*, that it was error to charge "that there was no evidence that the deceased and others were banded together at C's for the purpose of taking the life of the prisoner." McKinsey, 80—458.

Where the evidence shows that the prisoner could have escaped the threatened violence of the deceased, but slew him in the difficulty which ensued, an instruction that "if the prisoner was so situated that he could escape, but preferred to shoot rather than escape, he would at least be guilty of manslaughter," is proper. Kennedy, 91—572.

There was some evidence tending to show that deceased, who interfered to prevent the prisoner from killing another, was killed *accidentally*, and the court instructed the jury that, "if one is about to do an unlawful act, and a third party interferes to prevent it and is killed, it is murder:" *Held*, that this instruction was erroneous, since if the killing was accidental it was not murder. Shirley, 64—610.

It is error for the court, on disagreement of the jury, to charge the jury a second time in the absence of the prisoner. Blackwelder, 61 (Phil. Law), 38.

A witness testified that while a fight was going on between two other persons near, deceased passed by witness, and immediately the prisoner passed witness going toward the deceased; that in a short time he saw prisoner leaving deceased, and saw blood running from deceased, and that the prisoner ran; that the deceased had nothing to do with the fight going on between the other two persons; that the prisoner approached deceased coolly and slowly, but the witness did not see prisoner after he passed until he saw him running off: *Held*, that it was error to charge the jury that, if they believed the witness, the fact of the slaying was proved. Locke, 77—481.

It is not error to charge the jury that "where the prisoner comes to show his matters of excuse or mitigation, he is not required to prove these matters beyond a reasonable doubt, but he is required to prove them to the satisfaction of the jury; but the degree of proof is not so far relaxed that he may establish his matters of excuse or mitigation by a *bare preponderance* of proof, but must do so to the satisfaction of the jury." Carland, 90—668.

It is not error for the court to assume that as true which the prisoner in his defence has treated as true; as where a prisoner indicted for murder does not pretend that, if guilty of the homicide, he is guilty of anything but murder, but relies solely on the ground that he is not guilty of the homicide. Rash, 34 (12 Ired.), 382.

The prisoner and deceased quarrelled and both evinced a willingness to fight, but were prevented by others; the prisoner went off, but came back, when deceased presented a loaded gun and commanded him to stand; the prisoner then went into a house near by but out of sight of deceased, and procured his gun and returned to the deceased who immediately fired upon and slightly wounded the prisoner; deceased then sat his gun down, and the prisoner then fired and killed him: *Held*, no error to charge that if the jury believed the evidence, the prisoner was guilty of manslaughter. Crane, 95—620.

An instruction that the jury must be satisfied that deceased was killed by a pistol shot, without instructing them that the pistol was a deadly weapon, is not error when no question as to the character of the weapon was made on the trial. Brewer, 98—607.

On indictment for murder, the state's evidence showed that the prisoner was asked by deceased if the prisoner did not have a man with him under arrest; whereupon the prisoner immediately shot and killed deceased.

The evidence for the prisoner showed that deceased met the prisoner in the road, called him a damned horse thief, and at the same time dropped the muzzle of a loaded rifle upon the prisoner's bowels; that the prisoner endeavored unsuccessfully to wrench it from deceased; that all during the scuffle deceased was trying to shoot the prisoner; and that being unable to disarm deceased, the prisoner shot him with a pistol and killed him. The court charged the jury that the case was murder or no crime, as they should believe the testimony of the state or of the prisoner, and that the killing with a deadly weapon being proven or admitted, the burden of showing mitigating circumstances was on the prisoner, who must establish them to the satisfaction of the jury: *Held*, no error. Byers, 100—512.

Where the bill charges that the killing was done with a rock, it is not error to charge the jury that it is sufficient if the killing was done with a rock "or other missile." Speaks, 94—865.

Where there is a conflict of testimony which leaves the case in doubt, and the judge uses language in his charge to the jury which may be subject to misapprehension and is calculated to mislead, a new trial will be ordered. Rogers, 93—523.

Where three persons are on trial for murder, and the declarations of one of them, not made in the presence of the other two, are received as evidence against the one making the statement, and the court distinctly remarks in the hearing of the jury that such declarations are not evidence against the other two, and that the jury would be so instructed, but the judge fails to notice it in his charge, and counsel for the prisoners fail to call attention to it, such remark of the judge will be held to be equivalent to an instruction. Kilgore, 93—533.

On indictment for murder, defendant relied on insanity as a defence, and produced testimony tending to show that he was laboring, at the time, under an attack of *delirium tremens*; that he was also under the influence of an overdose of morphine, and that insanity was hereditary in his family: *Held*, that an instruction omitting to present distinctly the effect of the alleged frenzy resulting from the overdose of morphine, especially when a special instruction had been asked on that point, was erroneous, and was not cured by a general charge that "insanity was a complete defence to all criminal acts while under its influence, whether permanent or temporary, and from whatever cause produced." Rippey, 104—752.

An instruction that if one person inflicts a mortal wound, and before the wounded person dies, another kills him by an independent act, the former is guilty of murder, is erroneous, since it involves the absurdity of saying that the deceased was killed twice. Scates, 50 (5 Jones), 420.

It appeared that the prisoner, the deceased and others were together in a house; defendant went out and declared to a witness that he came near killing the deceased because he had cut him out of his (the prisoner's) girl: on re-entering the house he saw the girl sitting on the lap of the deceased, and after lying for awhile on a bed with a pistol in his hand he arose and approached the deceased and said with an oath, "I am going to kill you;" deceased then pulled his pistol and asked for peace, and the girl having left his lap, he arose and immediately the struggle began between him and the prisoner; by-standers grabbed the pistols of the men, the deceased saying he was willing to give up his—defendant refusing to surrender his; the men were then released and began pushing each other; defendant's foot went through the floor and his pistol was discharged; deceased then shot at but missed defendant, who thereupon fired again, fatally wounding deceased, who again fired at but missed defendant: *Held*, that the declarations of the defendant when he went out of the house and all his actions upon his return evinced a deadly purpose, and the evidence showed no such change of purpose and effort

by him to avoid a conflict, and no notice to deceased of such change after he had declared his purpose to kill the deceased, as would warrant a finding that the killing was in self-defence, and the court properly refused to instruct the jury that defendant was not guilty if his pistol went off by accident the first time and deceased began to shoot at him and defendant shot to save his own life or to escape great bodily harm. Edwards, 112—901.

It is not error to charge that in determining whether the prisoner was an aider and abettor in the murder, and therefore guilty in the second degree, the jury should not be influenced by the fact that another charged with the murder had been previously acquitted. Whitt, 113—716.

On a trial for murder the court gave the following instruction: "If you believe, from the evidence, that B and the prisoner were standing in the store by the fire, as detailed by the witnesses, and as soon as the difficulty between H and the deceased commenced they both rushed upon the deceased, either of them having a deadly weapon in his hand * * * and inflicted the wound upon him from which he died, the prisoner is guilty of murder; whether the deadly weapon was in his hands or those of B:" Held, that such instruction was erroneous in that it imputed the felonious act of one participant to the other without an inquiry or finding as to whether B and the prisoner entered into the fight by preconcert or whether the prisoner had previous knowledge of the possession and consented to the use of the weapon by the other. Howard, 112—859.

It is proper to refuse instructions based upon a purely hypothetical state of facts. Craine, 120—601.

Where the evidence is conflicting a charge is sufficient which simply defines the different degrees of murder and contains no array of the facts or instruction as to the law applicable to such facts as the jury may find to be true from the evidence. Groves, 121—563.

Where the evidence warrants it the court may instruct the jury that there is no evidence to reduce the homicide to an offence below murder. Wilcox, 118—1131.

It appeared that on the night of the killing defendant declared that if the deceased should go home with H he would kill deceased; that, in company with another, he went to the house of H, where deceased was, drew his pistol and informed H that he intended to kill deceased as soon as he opened the door; that he then told his companion to "do what he told him," whereupon the latter opened the door, and defendant shot deceased twice, inflicting wounds from which he died: Held, that an instruction that defendant was guilty of murder in the first or second degree, or not guilty, and that the killing was not excusable, justifiable, accidental, or manslaughter, was not erroneous. McDaniel, 115—807.

A charge to the jury that "the question of the lives and deaths of the defendants is in your hands; you must act honestly, conscientiously and fearlessly," is not erroneous. McDaniel, 115—807.

8. EVIDENCE.

Evidence that a state's witness received an anonymous letter about three weeks before the homicide, the contents of the letter tending to show that the writer was jealous of the deceased and containing threats against her, and that a few days after receiving it the witness asked the prisoner if she wrote him a letter, to which she replied she did, and said she hired a colored boy to carry it to the mail, is competent as tending to show unfriendly motive and hostile purpose of the prisoner towards the deceased; and where the cross-examination of such a witness mani-

festly shows a purpose to impeach him, it is competent to strengthen and corroborate his testimony by proving by a colored boy that about the time mentioned he carried a letter to the post-office at the request of the prisoner, who cautioned him not to let any one see it except a certain person. Morton, 107—890.

While error in excluding competent testimony is cured by afterwards admitting it from the same witness, it is not cured by admitting another to testify to the same purport. Rollins, 113—722.

A witness testified that on the night of the homicide, and near her house, she heard men cursing and quarrelling, one saying, "I will cut his throat." In answer to her cries of "murder" two or three men came to her door. The defendant proposed to ask her what she said to the men who came to her door, the purpose being to show that she told them that the men who were quarrelling were cutting a man's throat, and to thus corroborate her statements on the trial: *Held*, that the question was properly excluded as irrelevant and immaterial, since what she said to the men would not have served to corroborate her as to what she *saw*, but only to show her belief or surmise, at the time, of the nature of the occurrence. Rollins, 113—722.

The fact that one of the prisoners went, several hours after the shooting, to the house of the dying man and offered to wait on him, is no part of the *res gestae*, and was properly excluded. Whitson, 111—695.

On the trial of an indictment for poisoning it was in evidence that the deceased, before and after death, exhibited symptoms of arsenical poison; that flour, bread and dough, from which she had eaten had been taken, on the day of her death, from her house and given to the coroner, who, with another physician, both being medical experts, made an analysis and testified that they discovered the presence of arsenic. The coroner testified that he carried the substance given him to his private office; that it was possible for some one to have entered the office and put in the poison, but barely probable: *Held*, not error to admit the evidence of the existence of arsenic. Best, 111—638.

Proof that a written paper found near the body of the deceased was given to the prisoner's son for the use of his father, is a sufficient ground to permit the paper to go to the jury, with instructions to disregard it unless satisfied that it actually came into the prisoner's possession. Arthur, 13, (2 Dev.), 217.

Statements of one mortally wounded as to the intensity of his sufferings, not containing any reference to the transaction in which the wounds were received, are competent as natural evidence. Whitt, 113—716.

Declarations of defendant made a few hours before the homicide, and tending to show animosity against the deceased, are properly admitted as evidence. Baker, 119—912.

The solicitor was permitted to ask a female witness (for whose favor the deceased and the prisoner were rivals, and who was sitting in the lap of deceased just before the fatal struggle) whether the prisoner, when he came toward her and the deceased, appeared to be mad or in fun, and the witness replied that he seemed to be mad: *Held*, that such question being only a simpler form of an inquiry as to what the manner of the defendant was when he approached the deceased, was not improperly admitted. Edwards, 112—901.

Defendant testified that as he and his co-defendants approached the deceased and other Indians, the deceased threw a rock at him and the other defendants, one of whom was struck; and that he, the defendant thereupon assaulted and cut the deceased with a knife, and that he thought he was right in doing so, as he was afraid of the Indians: *Held*, that it

was not error to permit the state, on cross-examination, to ask defendant if he considered himself justified in jumping on the deceased and cutting him with a knife when one of the other defendants was already upon him. *Baker*, 119—912.

What a defendant charged with murder said to a witness, who, hearing pistol shots, ran to the scene of the homicide, arriving there between the third and fourth shots, and while several men present were struggling with each other, was competent as part of the *res gestae*, and also as corroborative of his testimony of the transaction given on the trial. *Rollins*, 113—722.

Where the witness for the state testified as an eye-witness to the homicide, and on cross-examination stated that he was not drunk, it was error to exclude proof offered to show that he was "very drunk on that occasion," such proof not being intended to impeach his character (in which case his answer on cross-examination as to his condition would have been conclusive), but serving to contradict and impair his evidence, and to show his incapacity to know and remember with accuracy what took place. *Rollins*, 113—722.

It is competent to show that the prisoners were living together under assumed names at the time of their arrest. *Whitson*, 111—695.

Defendant can not complain of the exclusion of his declarations made after the struggle and shooting which resulted in the death of his antagonist, if, in a subsequent period of the trial, all of such declarations are admitted after the state had called out a part of them. *Edwards*, 112—901.

On the trial of J and R for murder a witness for the state testified as to a conspiracy between defendants; that R and witness were in jail together and R told witness that they had been his ruin; that he said he met three persons named, and had started home, and they begged him to come back with them to hunt certain boys to get into an affray with them; that he had then turned and went back with them and that was his ruin. Defendant J was not present during this conversation: *Held*, that it was error to admit such testimony as against J. *Stanton*, 118—1182.

Where it appeared that a pistol was loaned to the prisoner it was not competent for him to show that he could hear of no one who had loaned him a pistol. *McKinney*, 111—683.

A witness for the state testified that he was present at the time of the killing and identified the prisoner as the perpetrator of the act. Soon after a number of persons assembled at the place, and, in the presence of the witness, accused persons other than the prisoner of the crime, to which witness made no response: *Held*, that the silence of the witness under such circumstances was a fact going to his discredit, and it was error to exclude the evidence of it from the jury. *Morton*, 107—890.

Where A, B and C are indicted for murder, and after a severance B is tried and convicted, and is then introduced by the state as a witness against A, he may be asked, for the purpose of contradicting him, if he did not tell the counsel of C, while conversing with him in jail, "that he was sorry A and C were put in jail for his devilment." *Davidson*, 67—119.

Evidence that "sometime before the deceased was killed," a third party went in the direction of the house of the deceased with a deadly weapon, threatening to kill him, is inadmissible. *Davis*, 77—483.

Evidence that a third party "had malice towards the deceased, a motive to take his life and the opportunity to do so, and had threatened to do so," is inadmissible. *Davis*, 77—483.

The deceased, a woman, was found dead just outside her house which was about a mile from town and about one-fourth mile from a public road. The prisoner previously had been seen frequently going in the direction of the deceased's house, and on the afternoon of the day preceding the finding of the body was seen at a place about a quarter of a mile from the house of the deceased, after which he went in the direction of her house. Shortly afterwards he was in town drinking, spoke of going to see his "old gal" and of having sexual intercourse with some woman, and was further heard to say, "I expect to kill some d—d woman, and have got money enough to carry me wherever I want to go." After his arrest splotches which had the appearance of blood were found on his clothes, but the tracks found near the place of the homicide did not correspond with the prisoner's foot. He made no attempt to fly: *Held*, that the evidence was not sufficient to warrant a conviction of murder. *Goodson*, 107—798.

The prisoner, shortly before his arrest on the charge of murder, had been apprehended for an assault on his wife; on being arrested for murder he said he had already given bond and expressed surprise at being again arrested: *Held*, that this was not *res gestae*, and his declarations were incompetent. *Moore*, 104—743.

Evidence that the prisoner, near the time of the homicide, was engaged in a disgraceful quarrel with his wife, the deceased being present and partly the subject of the wrangle, and that prisoner then threatened to kill deceased, and was shortly thereafter seen to follow her in the direction of the place where the mortal blow was given, is competent against him to show motive and opportunity. *Ib*.

Where the prisoner killed deceased on account of alleged improper intimacy between deceased and his sister, a letter written by deceased to the prisoner's sister on the night before the homicide, but which was never received by her, is incompetent to prove any fact stated by deceased prior to his death, or to show the state of the affection of deceased towards her, and that he intended to marry her. *Shields*, 90—687.

When the crime is shown to have been committed by a single person and the question is one of identification, it is competent to prove that another than the accused did the act; but this must be done by proof direct to the fact, and not by admissions or conduct seemingly in recognition of it. *Gee*, 92—756.

A witness who does not know the reputation of the accused, who was once a slave, may state what his former master said of him. *Ib*.

Where the officer making the arrest is accompanied by two large, strong men, unarmed, and the prisoner is a small, weak man, and no threats of violence are used and no inducements held out, the confessions of prisoner under such circumstances can not be excluded on the ground that he was put in fear by force and numbers. *Howard*, 92—772.

When the evidence is that the prisoner and deceased had gone into a barn together, a witness who passed the barn soon afterwards can testify to a conversation overheard between persons in the barn, although he does not know the prisoner's voice, and can only identify the voice of deceased. *Ib*.

In case of a conspiracy, evidence of the acts and declarations of one of the conspirators in furtherance of the common purpose, is competent, though made in the absence of the others. *Anderson*, 92—732.

Evidence of the acts and declarations may be admitted, in the discretion of the court, before proof of the conspiracy, the state undertaking to prove it at a later stage of the trial. *Ib*.

The declaration of a conspirator, at the time of the homicide, who was in close proximity to, but not within sight of the prisoner, upon hearing a pistol shot, that the prisoner had killed some one, is admissible in evidence. *Ib.*

Where a conspiracy is alleged between a person and the prisoner to take possession of a mine, in doing which the homicide took place, the declarations of such person, when setting out to take possession of the mine, as to his motives in doing so, are not competent for the prisoner. *Ib.*

Evidence is competent to show that the prisoners had bad feeling against deceased on account of some disputed accounts. *Gooch, 94—987.*

Evidence is not competent on the part of the prisoners that deceased kept false accounts with other persons. *Ib.*

Evidence that the deceased bore malice toward the prisoners is incompetent. *Ib.*

Evidence of the moral character of the deceased is irrelevant unless it is to show that he was a violent man, and it is only competent then when the evidence of the homicide is wholly circumstantial, and the character of the transaction is in doubt; or when there is evidence that the killing is done in self-defence. *Ib.*

Where there are several witnesses and the testimony is conflicting, it is error for the court to single out a single witness who is contradicted by others, and charge the jury that if they believe the testimony of such witness, then the prisoner was guilty of murder. *Rogers, 93—523.*

Testimony evoked on cross-examination by a prisoner can not form the ground of an exception, especially where it is immaterial and in no view prejudicial to the prisoner. *DeGraff, 113—688.*

A witness may testify that he made the same statement to others before going on the stand, but can not tell other things said in the same conversation, which were not brought out on the first examination. *Speaks, 94—865.*

Where a prisoner is accused of murder by poisoning with strychnia, it is competent to show that he bought some of the drug the previous year. *Cole, 94—958.*

Where an assault is made at the same time upon two persons, one of whom is killed, it is competent for the survivor to testify to the character and nature of the wounds inflicted on him. *Gooch, 94—987.*

Where the homicide is committed with a knife, and the prisoners offer evidence that one of them did not have a knife on the day of the homicide, it is competent for the state to show that both prisoners were seen together shortly before the homicide, and that one of them did have a knife. *Ib.*

There was evidence tending to show that the wound by which the deceased came to his death was inflicted by a coupling-pin; that a man, like the prisoner, had been seen the night of the homicide to drop out of his pocket a piece of iron about the length of a coupling-pin, which he wrapped in a white cloth, and that something like iron rust was afterwards found on the handkerchief in his pocket: *Held*, that evidence that the coupling-pin was found near the house where the prisoner boarded was admissible. *Brabham, 108—793.*

The evidence established a strong chain of circumstances tending to show that the prisoner killed his wife by choking her and then throwing her in the river, and there were appearances of a struggle on the bank near where the body was found: *Held*, no error to instruct the jury that if the killing was established, the crime was murder or nothing. *Jones, 98—651.*

On trial for murder, a witness testified that immediately after the fatal shot he heard a voice say, "I have got one of the damned rascals," and recognized the voice as that of one of the prisoners: *Held*, that a declaration of the witness, made soon after the killing, that he "knew the prisoner killed deceased," was competent as in corroboration of the statement made on the stand. *Brewer*, 98—607.

The evidence tended to show that one of the prisoners fired the fatal shot from an upper window late at night; that the other two prisoners, on the approach of deceased and his friends, went up-stairs with their comrade, some of them having pistols; that the firing immediately commenced, and that the prisoners were making a common cause: *Held*, no error to refuse to charge that there was no evidence to go to the jury that the two were present in the room when the shooting was done. *Brewer*, 98—607.

The evidence tended to show that the prisoner had slight motive to kill deceased, and that he had made indefinite threats against him; that his tracks were seen as if going from the place where the body of deceased was found towards the house from which he was taken, but the tracks were not measured, nor did it appear that the prisoner's feet were at all peculiar, nor did the witness say why she knew the tracks were his. On the night of the homicide the prisoner was in the house with others and appeared to be uneasy and anxious, and exclaimed without apparent cause, "Great God! boys, I'm going to leave this country." He gave no reason for this exclamation, and next morning he demanded the wages due him and seemed anxious, but did not fly: *Held*, that the evidence was insufficient to be submitted to the jury. *Brackville*, 106—701.

It is not error to permit a witness who arrested defendant to testify that on the way to the guard-house defendant asked witness to shoot him, and seemed furious. *Jacobs*, 106—695.

Pending the trial, the prisoner was placed in the asylum upon a verdict that he was insane, but was afterwards put on trial and pleaded "not guilty," and there was some evidence that the insanity was feigned: *Held*, that it was not error to permit the state to ask the prisoner, who was examined as a witness in his own behalf, "why he played off crazy." *Pritchett*, 106—667.

In such case it was not error to permit the superintendent of the asylum to testify as to the mental condition of defendant while in the asylum. *Ib.*

On a trial for murder, there was much evidence as to whether the ball extracted from the body of the deceased was a 32 or 38 calibre. Defendant proposed to prove that another person, who was arrested with him shortly after the homicide, sent by witness and got his pistol which was a 32 calibre; that defendant also sent witness and got defendant's pistol which was a 38 calibre, and also proposed to prove by the witness what was said and done at the coroner's inquest in respect to the two pistols: *Held*, that such evidence was incompetent, since it tended only very vaguely and indirectly to show that another person killed deceased, and evidence in such cases must be direct to the fact. *Pritchett*, 106—667.

The evidence was that deceased was probably slain while chasing a hog, and to connect the prisoner with the homicide the state was allowed to prove a declaration by her that "the hog was bruised, and when salted down after it was killed was nice, clean meat, but that when she put it in warm water, it would look like clotted blood:" *Held*, that such testimony, standing alone, is irrelevant. *Mikle*, 81—552.

After proof that the deceased kept money about him and was robbed on the night of the murder, the declaration of the prisoner, made twelve

months before the homicide, to the effect, "Don't you reckon if any one was to run in on old man Autrey (the deceased), he would get a handful of money?" is competent against him as tending to fix him with a *knowledge of the reputation* that deceased kept money in his house. Howard, 82—623.

Where the testimony is entirely circumstantial, evidence that the prisoner went to the room of witnesses about 12 o'clock on the night of the homicide, which was about one hour after it occurred; that his actions there were unnatural, that he spoke hurriedly and in a low tone, and that his hand trembled and he seemed nervous, when taken in connection with the other facts tending to show defendant's guilt, is competent. Brabham, 108—793.

The rejection of competent testimony is not ground for a new trial when the record shows that afterwards the rejected evidence was admitted. Anderson, 101—758.

On trial for murder, the evidence showed that the prisoner and his brother went to the house of deceased (their father) in his absence; that prisoner complained to deceased's wife of the conduct of a younger brother and threatened to whip him, and expressed bad feelings towards the father; that he and his brother then sharpened their knives, and the brother said, "Some one will be surprised to-night," to which prisoner assented; that afterwards, when the father arrived, a quarrel began between him and the prisoner, a fight ensued in which the father was killed by a stab; the evidence as to the circumstances of the fight and whether the prisoner acted in self-defence was conflicting, and it further appeared that he uttered heartless expressions towards his father after the fatal blow: *Held*, (1) that the declaration of the brother to the prisoner while sharpening their knives was competent; (2) that a charge that if the provocation was slight and the prisoner used excessive force he was guilty of murder was correct. Ellis, 101—765.

Where three persons are jointly indicted for murder and one of them joins the state in the prosecution of one of the others, it is not error to receive evidence introduced by the first against the second, though such evidence also implicates the third, when the court instructs the jury that they must consider the evidence only as against the second and not as against the third. Collins, 70—241.

Where a witness states on cross-examination that she "did not tell Mrs. L. on the day of the homicide that the deceased was sitting up, and she did not think he was hurt as bad as he pretended to be," the state calling out such evidence is bound by it, and can not call Mrs. L. to contradict the statement. Elliott, 68—124.

A witness may give the whole of a conversation which took place between him and the prisoner on the day after the alleged homicide, although in that conversation the witness, in answer to questions asked by the accused, expresses the belief, giving the reason for such belief, that the prisoner committed the homicide. Williams, 68—60.

Where a principal and an accessory are tried separately, though on the same indictment, evidence of the conviction of the principal is not admissible on the trial of the accessory unless judgment has been first rendered against the principal. Duncan, 28 (6 Ired.), 98.

Where the prisoner proves a sufficient legal provocation at the time to extenuate the homicide, it is not competent to prove, in order to show that the killing was not on the immediate provocation, but from previous malice, that the prisoner, a year or a month previously, had declared his intention to kill two or three men, it being admitted that he had no reference in such threats to the deceased as one of those men. Barfield, 29 (7 Ired.), 299.

The testimony of a grand juror that the prisoner was summoned before the grand jury while they were engaged in an inquiry as to the perpetrator of the homicide, and that the prisoner then charged another person with the killing, and betrayed unusual anxiety to fix it upon him, is competent. Broughton, 29 (7 Ired.), 96.

Evidence that prisoner's wife had been in the habit of committing adultery with the deceased, he not having caught them in the act at the time of the homicide, is inadmissible, because if admitted it would not extenuate the offence. John, 30 (8 Ired.), 330.

On indictment of a husband for killing his wife, the state has a right to prove a long course of ill treatment by the husband toward the wife for the purpose of showing malice. Rash, 34 (12 Ired.), 382.

Where the killing is charged to have been done with a piece of plank, evidence that a witness saw the deceased wearing a brown wool hat on the evening before the killing at night, and on the next morning after the killing he found strands of fine brown wool upon a stick which was picked up at the place of the homicide, and with which there was evidence tending to prove the killing was done, is properly admitted. Weddington, 103—364.

Proof that a written paper found near the body of the deceased had been given to the prisoner's son for the use of his father, is a sufficient ground to permit the paper to go to the jury, with instructions to disregard it unless satisfied that it actually came to the prisoner's possession. Arthur, 13 (2 Dev.), 217.

Declarations of a prisoner made after the commission of the alleged crime are not admissible in evidence for him, not even in support of insanity as a defence, unless they form a part of the *res gestae* to some act which is admitted in evidence. Vann, 82—631.

Where a person suspected of murder is arrested and brought before a jury of inquest as a witness and subjected to a rigid examination, such examination is not competent evidence against him on trial. Young, 60 (Winst. Law), 126.

After establishing the fact that the prisoner and deceased sold about 100 pounds of cotton in town on a certain day, and that on the way home they quarrelled about a small sum of money which deceased alleged the prisoner owed him, and that the killing was done on the night of the same day, the state was allowed to prove by a witness that on the same night about midnight he found that about 100 pounds of cotton had been stolen from his cotton house, that early next morning he found tracks there which he recognized as those of the deceased and the prisoner's wife, which were joined about twenty-five yards from the cotton house by the tracks of a man, but whose he could not tell, and that the tracks turned into a path leading toward the house of the prisoner. The theory of the state was that deceased and the prisoner were associated in the larceny of the cotton, and that the prisoner's motive to slay the deceased was to prevent his being a witness against him in the event he should be charged with the offence: *Held*, that the evidence as to the larceny of the cotton was incompetent, as being evidence of a collateral fact not sufficiently connected with the main issue. Brantley, 84—766.

In order to show that the prisoner had a motive for killing deceased where the evidence is circumstantial, it is competent for the state to introduce the record of an indictment for larceny pending against the prisoner and others, and also to prove that the deceased was implicated in the same, but was omitted from the indictment for having turned state's witness. Morris, 84—756.

The statements of bystanders made immediately after a homicide has been committed, are not admissible in evidence. Dunlop, 65—288.

Where three prisoners are on trial charged, as principals or accessories, with the same offence, the declarations of one, not made in the presence of the other two, are evidence against him. Kilgore, 93—533.

Evidence that a third person had malice toward the deceased, a motive to take his life, opportunity to do so, and had threatened to do so, is inadmissible. Lambert, 93—618.

In support of an allegation by the state that one of two prisoners on trial for murder killed the deceased in pursuance of a common design between him and the other prisoner, it was shown that, some two or three months before the homicide, the prisoners M and H referred to deceased as "a damned rascal;" that on the day of the homicide the prisoner H had a quarrel with deceased in the presence of M; that after said quarrel and on the same day H declared in the presence of M that if deceased would fight with him he would kill him; that some hours later deceased, on his way home from the scene of the quarrel, stopped on the road in front of prisoner H's house and engaged in a contention with another party; that thereupon prisoners came out to the road, and H at once charged deceased with having sworn to a lie against him, and called to M to "step up" to deceased to prove it; that M did "step up" as directed, whereupon deceased knocked him down upon his knees, M crying out, "Boys, don't let him kill me;" that H then drew a pistol and said, "Take care, I'll shoot him," about which time M drew a knife and from his recumbent position gave deceased a fatal stab: *Held*, that such evidence was properly submitted to the jury as evidence of the common design alleged, and of malice on the part of both prisoners. Matthews, 80—417.

The declaration of a third party that he shot the deceased is inadmissible. Boon, 80—461.

Evidence that another person borrowed a pistol, saying deceased had shivered his arm and he was going to hunt him up, and that such person absented himself thereafter, and did not return until after prisoner had been convicted of the murder of deceased on a former trial, is inadmissible. Jones, 80—415.

Where the evidence is circumstantial, each circumstance must be as distinctly proved as if the whole case turned upon it, and each circumstance so proved must, taken in connection with the other circumstances, tend to prove defendant's guilt. Messimer, 75—385.

Where the prisoner relies on insanity as a defence, but there is no evidence that he had ever exhibited any sign of insanity, evidence that some of his uncles and aunts were insane is inadmissible. Cunningham, 72—469.

On indictment of a mother for infanticide, it is error to permit a witness to relate a statement made by the mother of the prisoner in her presence that the prisoner had a child this way before and put it away," to which the prisoner made no reply. Shuford, 69—486.

Defendant was charged with causing the death of one G by screwing down the safety valve of a boiler of which G was fireman, thereby intentionally causing an explosion which resulted in the death of G and another. There was evidence tending to show that defendant had malice toward G, who had taken his place as fireman after his discharge from that position; that he was at the boiler alone about midnight of the night before the explosion; that the valve had been screwed down by some one unknown and the explosion thus caused; that the defendant soon after the explosion was heard to say that he had been expecting every minute that morning to hear the explosion, and consequently had not gone near it, and that he had said the day before that the explosion would occur, and that defendant's character was bad: *Held*, that the evidence was sufficient to be submitted to the jury. Beal, 119—809.

9. CHARACTER OF THE DECEASED.

The general rule is that evidence of the general reputation of the deceased as a violent and dangerous man is not admissible; to this rule there is a well-defined exception that such evidence is admissible when there is evidence tending to show that the killing may have been done in self-defence, or when the evidence is wholly circumstantial and the character of the transaction is in doubt. McNeill, 92—812.

Evidence of the general character of the deceased as a violent and dangerous man is, as a rule, inadmissible, but there are two exceptions to the rule—

1. Where there is evidence tending to show that the killing may have been done from a principle of self-preservation.

2. Where the evidence is wholly circumstantial and the character of the transaction is in doubt. But even in these cases the character of the deceased must have been known to the defendant. Turpin, 77—473.

Evidence as to the general character and habits of the deceased as to temper and violence is admissible *only* where the whole evidence as to the homicide is circumstantial. Barfield, 30 (8 Ired.), 344.

Where the wilful killing is admitted or proved and there is no evidence of self-defence, testimony as to the violent and dangerous character of the deceased and of his threats against the accused is not admissible. Byrd, 121—684.

Where the evidence is wholly circumstantial, testimony of the violent character and threats of the deceased, even if unknown to the prisoner, are admissible as tending to show the inherent probabilities of the transaction. Byrd, 121—684.

Where, though the plea of self-defence was set up, it did not appear that the defendant knew the character of the deceased for violence, evidence as to such violent character was properly excluded. Rollins, 113—722.

10. THREATS.

Evidence of threats by the deceased and of his violent character is not admissible to show self-defence unless such character was known and such threats communicated to the accused, except in cases where the evidence is purely circumstantial. Byrd, 121—684.

Evidence of a threat not communicated to the prisoner before the killing, is incompetent. Hensley, 94—1021.

There was evidence of threats made by deceased against defendant and communicated to defendant; there was also evidence that deceased had followed defendant to the house and that a rock was used by deceased upon defendant's head during the fight, but it did not clearly appear by whom the rock was introduced into the fight, the evidence on this point being wholly circumstantial. The defendant offered evidence of other threats made by deceased but not communicated to him: *Held*, that the evidence of the uncommunicated threats was admissible to corroborate the evidence of communicated threats, to show the state of feeling of deceased toward defendant, and the *quo animo* with which he pursued defendant to the house; and also as one of the circumstances tending to show who introduced the rock into the fight, the evidence on that point being wholly circumstantial. Turpin, 77—473.

While threats made in a thoughtless and bragging manner should not receive too much consideration from a jury, yet they are competent and proper evidence, and what weight they should have is a question for the

jury under proper instructions and a consideration of all the circumstances under which they were made. Horn, 116—1037.

11. KILLING BY OFFICER.

On the trial of a policeman for the murder of a person attempting a rescue of another under arrest, the court charged the jury that "where the arrest is made legally by a lawful officer he may use the amount of force necessary to prevent an escape or rescue, and no more, and if he use excessive force and death results, he is guilty of manslaughter; but if excessive force is used and he intentionally slays the person resisting arrest or attempting the rescue, he is guilty of murder." *Held*, that while it would have been proper for the judge to add that what would be excessive force in an individual in an ordinary encounter might not be so in an officer resisting the escape or rescue of a prisoner, yet the omission to so charge when not asked to do so was not error. Rollins, 113—722.

Where a person is lawfully in the custody of an officer and a rescue is attempted, the officer may arrest the person attempting the rescue and may use such force as is necessary. Rollins, 113—722.

A police officer can not judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person to prevent a rescue, but the jury must pass on the necessity for such killing. Bland, 97—438.

A homicide may be justified when it takes place to prevent a threatened felony, but not when inflicted as a punishment for one already committed. Roane, 13 (2 Dev.), 58.

The deceased had been engaged, some hours previous, in a dangerous affray, in which he had been severely wounded, and was on his way home, carrying a pistol in his hand. A justice of the peace verbally commanded the prisoner to follow and arrest him. In attempting to do so, deceased resisted, displaying his pistol, when the prisoner killed him: *Held*, that, as the prisoner had no authority to make the arrest, he was not justified in the killing. Campbell, 107—948.

Where a defendant, in a state's warrant charging a misdemeanor, puts himself in armed resistance to the officer having such warrant, and the officer, in an attempt to take defendant, slays him, without resorting to unnecessary violence, he is justifiable. Garrett, 60 (Winst. Law), 144.

Good faith and want of malice apply as to extent of force used by an officer in resisting a rescue of a prisoner when the arrest is legal, but do not validate an illegal arrest; hence, when a person submits to arrest and a rescue is attempted, the officer may not resist such rescue or use such force as is necessary to prevent the rescue if the original arrest was unlawful. Rollins, 113—722.

Where an officer having lawfully arrested a person and in resisting an attempted rescue, uses such signal force that death is caused thereby, there is no presumption of law that he acted without malice and in good faith, i. e., without excess of force, it being for the jury to judge of the reasonableness of the force used, and for the defendant to show matter in excuse or mitigation. Rollins, 113—722.

Where a person is lawfully under arrest, and another attempts to rescue him, the officer in resisting such attempt is justified in using such force as would ordinarily be considered as excessive, provided he acts in good faith and without malice. Rollins, 113—722.

On the trial of a policeman for murder the court charged that an officer may arrest without warrant for a breach of the peace committed in his presence, but that he must, unless a known officer, notify the person that he is an officer, and if he fail to do so, especially on demand, the arrest is illegal and may be lawfully resisted by the person arrested; and if the

person making the arrest kill any one of those resisting it, he would be guilty of murder unless excessive force was used by those resisting it, in which latter case he would be guilty of manslaughter: *Held*, that the instruction was proper and not objectionable as expressing an opinion that defendant was or was not a known officer. *Rollins*, 113—722.

To justify the homicide of a felon, for the purpose of arresting him, the slayer must show not only a felony actually committed, but also that he avowed his object, and that the felon refused to submit. *Roane*, 13 (2 Dev.), 58.

12. COOLING-TIME.

The doctrine of cooling-time only applies when there has been legal provocation, and no words, however insulting, and no actions or gestures expressive of contempt, unaccompanied by indignity to the person, by a battery, or at least by an assault, amount to a legal provocation so as to mitigate a slaying from murder to manslaughter. *McNeill*, 92—812.

Where a violent altercation in words had taken place between the prisoner and the deceased, and, after being separated for between five and ten minutes, they again came together, and, after angry and insulting words passed between them, the prisoner shot the deceased, the killing is murder and not manslaughter. *Ib.*

The separation of two persons engaged in a fight, which eventually terminates in a homicide, to justify a verdict of murder must be for a time sufficient for the passions excited by the fight to have subsided, and reason to have resumed its sway, and the testimony of one witness that the prisoner was "absent no time," and of another that after the fight he started to go home and looking back the parties were again fighting, does not show sufficient cooling-time to justify a verdict of murder. *Moore*, 69—267.

What is *time to cool* between the occurring of a legal provocation and the infliction of a mortal blow is a question of law, and it is error to leave it to be passed on by the jury. *Sizemore*, 52 (7 Jones), 206.

13. MALICE.

A witness testified that the prisoner told her on the day of the homicide that he had bought powder and shot and intended to kill a man that night, and exhibited his pistol, but refused to name the man. Another witness testified that a quarrel was going on between the prisoner and another in a shop kept by the prisoner's father, when deceased took up the quarrel and a sharp quarrel then ensued between them. After some time the prisoner started to go to bed, but was opposed by deceased who said he should not go to bed; the prisoner answered that it was hard if he could not to go to bed in his father's house, and took a candle and went into the back room and was in the act of ascending the stairs when deceased went and seized him by the collar, pulled him through the back room and shop to the front door, and pushed him out, kicking him at the same time. Witness then left, but soon heard the report of the pistol which killed deceased. The prisoner admitted the killing to other witnesses. The judge instructed the jury that although the provocation stated by the second witness was sufficient to reduce the killing to manslaughter, yet if connecting the evidence of the first witness with the other evidence, they could collect the fact that deceased was the object of the threat deposed to by her, and that the prisoner went to the shop with the intention to provoke a quarrel with the deceased, in order to gratify his avowed vengeance, then the killing was murder, notwithstanding the provocation:

Held, that the instruction was proper. Daniel, J., *dissenting*, says that although the evidence of the indefinite threat to kill, coupled with the killing, was sufficient to be left to the jury to say whether the deceased was the object of the malice expressed against some one, yet the case ought to have been so submitted that the jury might find a *locus penitentiae* or *cesser* of the former grudge; and that if they should find that the prisoner fired when his blood was boiling by the provocation, the presumption arises that the killing was under the impulse of immediate anger and excitement, and the express malice is negatived. Johnson, 23 (1 Ired.), 354.

Where express malice is shown to have once existed, but a subsequent reconciliation, followed by fresh provocation, is proved, the law will refer the motive of the slayer to the recent provocation, and not to the antecedent malice, unless the special circumstances of the case forbid such a presumption. Barnwell, 80—466.

Although a person may not go in search of or lie in wait for another whom he kills, yet if he has formed the purpose to kill him, and, within a short time after forming and avowing such purpose, he, duly armed, meets the other by chance, whether in public or in secret, and slays him immediately, there is a presumption that he did it on the previous purpose and grudge, if there is no evidence of a change of purpose. Tilly, 25 (3 Ired.), 424.

The killing with a deadly weapon being admitted or proven, malice is implied, and the prisoner's drunken condition at the time of the killing does not repel malice and reduce his crime to a lower grade. Potts, 100—457.

The rule which refers the motive of the slayer to antecedent malice rather than to an immediate provocation, is confined to cases where there is a *particular and definite intent to kill*, as where the weapon with which the party intends to kill is shown, or the time and place fixed on, and the party goes to the place at the time for the purpose of meeting his adversary and with an intent to kill him; but where the slayer bears malice toward deceased, and they meet by accident, and upon a quarrel, deceased assaults the prisoner with a grubbing hoe, and thereupon the prisoner shoots and kills him with a pistol, the rule does not apply. Johnson, 47 (2 Jones), 247.

The prisoner must satisfy the jury of the facts and circumstances relied on to rebut malice. Wilcox, 118—1131.

The common law principle that malice is presumed from the killing with a deadly weapon, and the prisoner has the burden to rebut malice, is modified by the act of 1893 only to the extent of making the killing, when nothing else appears, murder in the second degree instead of in the first degree. Wilcox, 118—1131.

The presumption that killing with a deadly weapon implies malice extends only to murder in the second degree. Booker, 123—713.

Provocation does not disprove malice, but only removes the presumption of malice which the law raises without proof. Johnson, 23 (1 Ired.), 355.

PRETENDED RECONCILIATION.—If there be an old grudge between two persons and *they are reconciled again*, and *then* upon a new and sudden quarrel one kills the other, it is not murder; but if from the circumstances it appears that the reconciliation was but pretended or counterfeited, and that the killing was done upon the force of the old malice, it is murder. Johnson, 23 (1 Ired.), 354.

THE CONTINUATION OF EXPRESSED MALICE PRESUMED.—When the existence of deliberate malice in the slayer is once ascertained, its continuance down to the perpetration of the meditated act must be presumed, until there is evidence to repel it. Johnson, 23 (1 Ired.), 354.

WHEN MALICE IS ONLY TO BE INFERRED FROM ALL THE CIRCUMSTANCES.—Where there is an antecedent grudge, and the parties between whom it exists meet and an affray ensues, and one is killed, the killing is not necessarily, by a presumption of law, to be referred to the antecedent grudge so as to make the killing murder; but the existence of malice in giving the mortal blow is a matter of inference for the court or jury from all the circumstances, of which the antecedent grudge is one. Ta-chana-tah, 64—614.

14. PROVOCATION.

PROVOCATION.—*Words*, however grievous, are not sufficient provocation to reduce the crime of murder to manslaughter. Carter, 76—20.

It is not necessary that a blow, in order to amount to legal provocation, should be one that endangered the life of the slayer. Sizemore, 52 (7 Jones), 206.

The question whether facts amount to a sufficient provocation to palliate a killing from murder to manslaughter is entirely a question of law, and is for the court to decide. Craton, 28 (6 Ired.), 164.

Where there is but slight provocation, if the killing be done with an excess of violence out of all proportion to the provocation, it is murder. Chavis, 80—353.

Where two persons have formerly fought on malice, and are apparently reconciled, and fight again on a fresh quarrel, it shall not be intended that they were moved by the old grudge, unless it so appear from the circumstances of the affair. Hill, 20 (4 D. & B.), 491.

Whenever force is used upon the person of another, under circumstances amounting to an indictable offence, such force is legal provocation. Miller, 112—878. Caesar, 31 (9 Ired.), 391.

If the killing be committed in an *unusual manner*, showing evidently that it is the effect of deliberate wickedness, it is murder, although there be great provocation. Currey, 46 (1 Jones), 280.

WHEN PROVOCATION NO DEFENCE.—Where a deliberate antecedent purpose to kill is ascertained, and there is a consequent unlawful act of killing, the immediate provocation, whatever it may be, which precedes the act, is to be thrown out of the case and goes for nothing, unless it can be shown that this purpose was abandoned before the act was done. There can be no such thing in law as a killing with malice, and also on the *furor brevis* of passion, and provocation furnishes no extenuation unless it produces passion. Malice excludes passion; passion presupposes the absence of malice. In law, they can not co-exist. Johnson, 23 (1 Ired.), 354.

WHEN THE RULE WHICH REJECTS THE PROVOCATION APPLIES.—Before the rule which refers the motive in killing to antecedent malice, rather than to the immediate provocation can apply, there must be something to show a *particular and definite intent to kill*; as if the weapon with which the party intends to kill is shown, or the time and place are fixed on and the party goes to the place at the time for the purpose of meeting his adversary and with an intention to kill him; so that the provocation is a mere collateral circumstance, and the intent to kill existed before and independently of it. Johnson, 47 (2 Jones), 247.

ABANDONMENT OF PURPOSE NOT PRESUMED.—There is no legal presumption that where a provocation intervenes between the expression of malice and the act of killing, the slaying was upon passion and not malice; but while the most determined purpose to kill may be repented of, and malice, however deeply settled, may be abandoned, still if the act be done which that purpose contemplated, repentance of the criminal purpose will not be

presumed, and it is incumbent on the prisoner to show that he had abandoned his unlawful purpose before the act of killing. Johnson, 23 (1 Ired.), 354.

KILLING UPON A SECOND PROVOCATION PRESUMED TO BE FROM PASSION.—Where a deliberate purpose to kill is ascertained, provocation will not extenuate the killing to manslaughter, although the act speedily follows upon the provocation, and before the blood, if raised to the boiling point of passion, has time to cool, if, from the adverse and deliberate expression of malice, it can be collected that the blood *was not* thus heated by that provocation; but if no act of killing *then* take place and an additional provocation be received, and *thereupon* the person so provoked slay his adversary, it is a fair presumption, unless the circumstances of fact show the contrary, that *this superadded provocation* did produce such highly excited passion, and the act of slaying proceeded from this passion. Johnson, 23 (1 Ired.), 354.

Where express malice is shown to have once existed, but a subsequent reconciliation, followed by fresh provocation, is proved, the law will refer the motive of the slayer to the recent provocation and not to the antecedent malice, unless the special circumstances of the case forbid such a presumption. Barnwell, 80—466.

15. MURDER.

(Decisions prior to Act of 1893).

PREPARING DEADLY WEAPON WITH INTENTION TO USE IT.—Where one person prepares a deadly weapon with intention to use it in case he gets into a fight with another, and goes to a particular place for the purpose of meeting with him and having a conflict with him, and a fight ensues in which that other is killed, the slayer is guilty of murder because of the preconceived malice, though the deceased first assaulted him with a deadly weapon. Hogue, 51 (6 Jones), 381.

DECEASED TAKEN IN ADULTERY WITH SLAYER'S WIFE.—For a husband to slay one taken in adultery with his wife on the spot, is manslaughter; but to slay one because he had, before that time, committed adultery with his wife, or because he believed he was going off with her to commit the act, is murder. Samuel, 48 (3 Jones), 74.

KILLING TO PREVENT A TRESPASS.—Where one person kills another to prevent a mere trespass on his property he is guilty of murder, whether such trespass could or could not have been otherwise prevented. McDonald, 49 (4 Jones), 19.

KILLING THIRD PERSON.—If one man assails another and is about to commit an unauthorized act of violence upon him, and a third person interposes to prevent it and is killed by the assailant, it is murder. Benton, 19 (2 D. & B.), 196.

KILLING WITH MALICE THOUGH OUT OF NECESSITY.—If a man assault another with malice prepense, even though he should be driven to the wall and kill his adversary there to save his own life, he is guilty of murder in respect of his first intent. Hill, 20 (4 D. & B.), 491.

DECEASED STRIKING IN SELF-DEFENCE.—Where, after words of anger, the slayer took up an axe and approached the deceased with a present purpose and design to take his life, or do him some great bodily harm, and the deceased had sufficient grounds to believe that such was the intention of the assailant, he had a right to strike in self-defence, though the assailant was not yet in striking distance, and such striking by the deceased will not amount to a legal provocation to mitigate the killing to manslaughter. Baker, 46 (1 Jones), 267.

PRISONER RETURNING TO SEEK DECEASED.—There was evidence that the prisoner and deceased were angrily quarrelling and the deceased began to pull off his coat and the prisoner being in striking distance started to draw his knife, when a bystander interfered and carried the prisoner out of the house, and prisoner rushed back into the house asking where deceased was, who answered "here," both swearing, and prisoner ran at him and fatally cut him: *Held*, to be murder. *Smith*, 77—488.

CIRCUMSTANCES IN EXTENUATION FROM STATE'S WITNESS.—It is not error for the court to refuse to charge the jury that when a prisoner relies upon extenuating circumstances to reduce the grade of the offence from murder to manslaughter or excusable homicide, and circumstances come out from the state's witnesses which tend to establish the defence, then it is the duty of the jury to consider all the evidence, and if they are not satisfied of the guilt of the prisoner beyond a reasonable doubt, they should acquit. *Gooch*, 94—987.

TWO IN PURSUIT OF AN UNLAWFUL ACT.—Where two persons are engaged in the pursuit of an unlawful act, and, in pursuit of that common purpose, one of them takes life under such circumstances as makes it murder in him, the other is guilty of murder also. *Gooch*, 94—987.

If two persons seek another, and under pretense of a fight, conspire to stab and kill him, it is murder, no matter what the provocation may be after the fight commenced. *Ib.*

VIOLENCE OUT OF PROPORTION TO PROVOCATION.—If, in a fight, one party uses excessive violence out of all proportion to the provocation, and kills the other, it is murder, although he had no intention to take life when the fight began. *Gooch*, 94—987.

ARMING WITH INTENT TO KILL.—Where the prisoner formed a particular and definite purpose to kill, and in pursuance of that purpose, armed himself, sought the deceased and killed him, he is guilty of murder, no matter what provocation was given or how high his passions were aroused during the fight. *Pankey*, 104—840.

BURDEN ON DEFENDANT WHEN KILLING PROVEN.—Where the killing is admitted or proven, it is incumbent on defendant to satisfy the jury that the offence is manslaughter, or they must convict of murder. *Thomas*, 98—599.

ACTING COOLLY AND WITH VIOLENCE.—The degree of homicide is murder where the prisoner acts coolly and vengefully or with violence out of all proportion to the provocation, and this whether there be "cooling-time" or not; therefore, where, in an altercation about the payment of an alleged debt, the deceased promising to pay when he got the change, the prisoner threatening to whip him if he did not do so then and there, deceased, unarmed, remonstrated with the prisoner and expressed friendship for him; a fight ensued in which deceased was knocked down; they were separated and deceased went off; prisoner at the request of a witness put up his pistol which had been drawn, promising to do no more, but followed and overtook deceased and engaged in another fight, deceased crying out, "hold him off me," and killed deceased with a deadly weapon, it was held that the prisoner was guilty of murder. *Boon*, 82—637.

KILLING FROM MALICE THOUGH MEETING BY CHANCE.—If A, from previous angry feelings, on a meeting with B, strikes him with a whip with the view of inducing B to draw a pistol, or believing he will do so in resentment of the insult, and determines if he does so to shoot B as soon as he draws, and B does draw, and A immediately shoots and kills B, this is murder. *Martin*, 24 (2 Ired.), 101.

DECEASED PRESSING FOR FIGHT AFTER BEING THREATENED.—The deceased had threatened to kill the prisoner about three weeks before the homicide, and this threat had been communicated to the prisoner. They met in the

street on a star-light night when they could see each other; the deceased pressed for a fight, and the prisoner retreated for a short distance, the deceased overtook him when the prisoner stabbed and killed him, the deceased having no deadly weapon at the time: *Held*, that the prisoner was guilty of murder. Daniel, J., *dissenting*. Scott, 26 (4 Ired.), 409.

KILLING WITH EXPRESS MALICE THOUGH UNDER PROVOCATION.—If one seek another and enter into a fight with him with the purpose, under the pretence of fighting, to kill him, if a homicide ensues, the assailant is guilty of murder, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat, for the malice is express. Lane, 26 (4 Ired.), 113.

DECEASED STRIKING FIRST.—After a quarrel deceased started to leave, and had gone about fifty yards, but being pursued and overtaken by the prisoner, who came with a knife in his hand and with his arm uplifted, he turned and struck the prisoner the first blow, and was immediately stabbed by the prisoner and killed: *Held*, that the deceased was justified in anticipating the premeditated assault, and that the prisoner was guilty of murder. Howell, 31 (9 Ired.), 485.

FIGHTING UNDER UNFAIR ADVANTAGE.—When persons fight on fair terms, and, after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument and inflicts a deadly injury, it is manslaughter only; but if a party enters a contest dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. Hildreth, 31 (9 Ired.), 429.

KILLING BYSTANDER ASSISTING OFFICER TO ARREST.—Where an officer calls on a bystander to assist in disarming a prisoner whom he has arrested, and the prisoner, on the bystander's taking hold of him, draws a pistol and kills the bystander, it is murder. McMahan, 103—379.

KILLING TO PREVENT TRESPASS.—If a person deliberately kill another to prevent a mere trespass to property, he is guilty of murder. Brandon, 53 (8 Jones), 463.

NURSE GIVING CHILD LAUDANUM.—A nurse who gives a child laudanum enough to kill it, knowing that laudanum was poison and likely to kill, nothing else appearing, is guilty of murder. Leak, 61 (Phil. Law), 450.

DEMANDING SATISFACTION FOR INSULT.—One who pursues another, armed with a gun, for the purpose of demanding satisfaction for an insult received, and to kill him or do him some great bodily harm should the demand for satisfaction be refused, is guilty of murder if he kills, though deceased came back to meet him on his approach, and put his hand to his side as if to draw a pistol. Owen, 61 (Phil. Law), 425.

ONE KILLING IN FURTHERANCE OF COMMON PURPOSE.—Where two persons form the purpose of wrongfully assailing another, and one of them, in furtherance of such common purpose, slays him with a deadly weapon and without provocation, they are both guilty of murder. Simmons, 51 (6 Jones), 21.

FIGHTING ON SUDDEN QUARREL BUT ON UNEQUAL TERMS.—If two men fight on a sudden quarrel with deadly weapons, and one strikes the other a mortal blow before the person so stricken is prepared to use his weapon, the killing is murder; and so it is if any unfair advantage be taken; and if one uses a stick and the other a knife or pistol, they do not fight fairly and on equal terms, and the party killing is guilty of murder. Ellick, 61 (Wins. Law), 56.

ADULTERY OF PRISONER'S WIFE WITH DECEASED.—The prisoner, who suspected his wife of unfaithfulness, followed her stealthily as she was going to a neighbor's, and having come up with her as she was talking with a man with whom she had previously been on terms of criminal intimacy, she ran away, and he fell upon the man with a stone and a knife and killed him: *Held*, to be murder. Avery, 64—608.

SEEKING DECEASED FOR A FIGHT WITH INTENT TO KILL.—Where the prisoner seeks the deceased for the purpose of fighting with him, intending to kill him if he resists, and a fight ensues, and the prisoner slays the deceased, it is murder, although deceased puts the prisoner in great danger of his life during the fight. Hensley, 94—1021.

DECEASED ASSAULTING PRISONER'S WIFE WITH INTENT TO RAPE.—In a case of homicide, in order to entitle the accused to the benefit of the rule reducing a killing to manslaughter on account of an assault upon his wife with intent to commit a rape, or for adultery, it must appear that he detected the act in its progress and slew the wrongdoer on the spot; to slay one after such wrong has transpired, upon subsequent information of the fact, is murder. Neville, 51 (6 Jones), 423.

HOMICIDE—PARENT AND CHILD.—Although the law allows to a person in *loco parentis* the broadest latitude in governing, it is not necessary to prove express malice on his part in order to convict of murder, if the facts show such cruelty and inhumanity in whipping as exclude the idea of passion. Harris, 63—1.

It is, ordinarily, true that an actual intent to *kill* is involved in the idea of murder, but it is not always so. If great bodily harm be intended, and that can be gathered from the nature of the means used, or other circumstances, and death ensues, the party will be guilty of murder, although he may not have intended death. Hoover, 20 (4 D. & B.), 365.

WHEN THE COURT MAY CHARGE MURDER IF THE EVIDENCE IS BELIEVED.—When there is not one single circumstance in the *immediate* transaction to justify, excuse or mitigate the homicide, it is not error to instruct the jury that malice is implied and that the offence is murder, although there may be circumstances more remote which tend to mitigate the homicide, as where the prisoner and deceased were on friendly terms before the transaction, or where the prisoner manifests sorrow immediately afterwards, or has an opportunity to escape and does not do it. But where the *immediate* circumstances of the killing are such as to make it of *doubtful* character, then it is proper to look to circumstances further off to enable us to solve the doubt. Elwood, 73—189.

Though the law may raise a presumption from a given state of facts, nothing more appearing, it is the province of the court, when all the facts are developed, to tell the jury whether, in every aspect of the testimony, such presumption is rebutted. Miller, 112—878.

Where there is not even a scintilla of evidence of self-defence there is no error in instructing the jury that there is no evidence tending to show that the killing was done in self-defence. Byrd, 121—684.

16. INTOXICATION.

A request for a special instruction that if the prisoner was actually intoxicated when the act was committed he would not be guilty of murder in the first degree was properly refused, since such request leaves out of view the consideration whether the prisoner had made himself drunk for the purpose of executing a premeditated intent to kill, or whether he availed himself of a drunken condition to execute a premeditated resolution to do the act. Kale, 124—.

If one possessed of capacity sufficient to distinguish right from wrong is so mentally or physically constituted by nature, or became so by reason of some accident or affliction, that by the use of intoxicating liquors he loses his reason and becomes furious, and knowing this, he voluntarily becomes drunk, and, while under the temporary dethronement of reason, kills another without justification, he is guilty of murder. Wilson, 104—868.

DELIRIUM TREMENS AND DIPSOMANIA.—Delirium tremens is recognized as a species of insanity, but "dipsomania" and "moral insanity" are not recognized as defences. Potts, 100—457.

Voluntary drunkenness is no excuse for the commission of crime. Keath, 83—626.

Drunkenness at the time the act is committed, nothing else appearing, does not repel malice nor lower the grade of the crime. Kale, 124—.

If one charged with murder has premeditated and deliberately formed the intention to kill, and did kill, when drunk, the offence is not reduced to the second degree on account of the drunkenness. Kale, 124—.

When drunkenness is relied on to reduce the grade from murder in the first to a lower degree, the killing and its manner, the intent, intoxication, how it came about, and for what purpose the drunkenness took place, and the like, are questions for the jury, under proper instructions. Kale, 124—.

Though defendant was intoxicated at the time of the killing, yet if he had mind sufficient to plan and form a design to kill, and to deliberate and premeditate upon the killing in consequence of the formed design, the fact of intoxication will not justify defendant. McDaniel, 115—807.

17. INDICTMENT.

Sec. 251. Homicide; indictment. 1887, c. 58.

In bills of indictment for murder and manslaughter, it shall not be necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person or persons accused, and the county of his or their residence, the date of the offence, the averment "with force and arms," and the county of the alleged commission of the offence, as is now usual, it shall be sufficient in describing murder to allege that the accused person or persons (as the case may be), feloniously, wilfully, and of his or their malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it shall be sufficient in describing manslaughter to allege that the accused feloniously and wilfully, did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be.

INDICTMENT UNDER ACT OF 1887.—An indictment for murder in the following words is sufficient: "The jurors for the state on their oaths present that A B, in the county of E, did feloniously, and of malice aforethought, kill and murder C D." Arnold, 107—861.

An indictment for murder in the following form is sufficient: "The jurors for the state upon their oaths present that E M, late of G county, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the seventh day of October in the year of our Lord one thousand eight hundred and eighty-eight, with force

and arms at and in said county feloniously, wilfully and of his malice aforethought, did kill and murder L H, contrary to the form," &c. Moore, 104—743.

INDICTMENT PRIOR TO ACT OF 1887.—The use of the word "blow" for "wound" in an indictment charging the killing with a club, with which the prisoner struck deceased "in and upon the left side of the head, cutting the left ear and mashing the nose and left cheek bone," of which "mortal blow" it is alleged the deceased instantly died, is no ground for arresting the judgment, since the other words used show that a wound was given and what kind of a wound it was. Nash, C. J., *dissenting*. Noblett, 47 (2 Jones), 418.

An indictment for murder by poison need not necessarily contain an averment that the prisoner knew of its noxious properties, though such averment is proper and always safer. Slagle, 83—630.

An indictment charging that the prisoners "did make an assault and in some way and manner, and by some means, instruments and weapons, to the jurors unknown, did then and there feloniously, wilfully, and of their malice aforethought deprive him, the said A of his life, so that the said A did then and there instantly die," is sufficient, though the evidence presents different ways and means by which the deceased might have been killed. Parker, 65—453.

An indictment for murder by a blow or stroke must allege the infliction of a *mortal wound*, and it is not sufficient to charge the infliction of a "wound which produced instant death." Morgan, 85—581.

The indictment is sufficient if it charge that the homicide was committed "in some way and manner and by some means, instruments and weapons, to the jury unknown." Williams, 52 (7 Jones), 446.

A description of an instrument by which a mortal blow was given as "a certain wooden stick of no value," is sufficient without giving its length and thickness so as to show it was a deadly weapon. Smith, 61 (Phil. Law), 340.

A defect in the indictment caused by spelling the day of the month on which the homicide was alleged to have been committed as the "*twelfth*" day of August instead of the "*twelfth*" day, is cured by Code N. C., sec. 1189. Shepherd, 30 (8 Ired.), 195.

An indictment which sets forth the time of the commission of the offence as "on the third day of August, eighteen hundred and forty-three," without using the words "the year of our Lord," or even using the word "year," is sufficient. The defect is cured by Code N. C., sec. 1189. Lane, 26 (4 Ired.), 113.

Where the name of the county is in the margin in the body of the bill, the omission of *North Carolina* in the indictment is no ground for arresting the judgment, since the trial judge must know that he is holding a court in that county of the state and for the state. Lane, 26 (4 Ired.), 113.

Where the assault is alleged to have been committed in a county in this state, and the death to have occurred in another state, the indictment need not conclude *against the form of the statute*. Dunkley, 25 (3 Ired.), 116.

An indictment which does not show that the death happened within a year and a day after the wound was given is defective. Orrell, 14 (3 Dev.), 139.

An allegation that the deceased of the said mortal wound "did languish and then and there did die," is a sufficient averment of the time of the death, and that it occurred within a year and a day. Haney, 67—467.

It is not necessary to allege that the killing was wilfully done. Arnold, 107—861.

18. MISCELLANEOUS QUESTIONS.

EFFECT OF NEW TRIAL.—Where upon indictment for murder a conviction is had for a lesser offence, if upon appeal a new trial is granted, the case goes back for trial for the full offence charged in the indictment. *Freeman*, 122—1013.

If the prisoner is convicted of a lesser offence, and upon appeal a new trial is granted the case goes back for trial *de novo* upon the charge of murder. *Craine*, 120—601.

KILLING BY SECOND ASSAILANT.—If deceased, while languishing of a mortal wound, is killed by a second assailant, the first is not guilty of murder. *Hambright*, 111—707.

WOUND AGGRAVATED BY DECEASED.—If the wound is mortal—sufficient to produce death—and death follows, it will be attributed to the wound, even though death was facilitated by some act of the deceased. *Hambright*, 111—707.

SUBMISSION FOR MANSLAUGHTER—EFFECT.—Where a prisoner agrees to a verdict of manslaughter, which is entered, the submission to such verdict is an acknowledgment and confession of the facts which constitute that crime, and an appeal from the judgment thereon can not bring into question the regularity and correctness of the proceeding. *Moore*, 120—565.

NEGLECT OR MALTREATMENT.—It is no excuse to show that had proper caution and attention been given a recovery might have been effected. Neglect or maltreatment will not excuse except in cases of doubt as to the character of the wound. *Hambright*, 111—707.

KILLING IN SPORT—THE TEST.—Where one kills another in sport and by accident the test of responsibility depends upon whether the conduct of the accused was lawful, or, not being so, was so grossly careless or violent as necessarily to imply moral turpitude; if the sport is unlawful and dangerous the killing is manslaughter; if lawful and not dangerous it is homicide by misadventure. *Vines*, 93—493.

GUILT OF OTHERS.—The fact that one person charged in the same bill has been convicted of the crime alleged, is no bar to the conviction of the other parties indicted. *Jacobs*, 107—873.

DISPROPORTIONATE VIOLENCE.—When a man makes an assault, which is returned with a violence manifestly disproportionate to that of the assault, the character of the combat is essentially changed, and the assaulted becomes in turn the assailant; and if the person who made the first assault, in the transport of passion thus excited, and without previous malice, kill his adversary, the proper enquiry as to the degree of his guilt is not whether he was possessed of deliberation or reflection so as to be sensible of what he was then about to do, and intentionally did the act, but whether a sufficient time had elapsed after the violent assault upon him, and before he gave the mortal wound, for passion to subside and reason to re-assume her sway, for if there had not, he would be guilty of manslaughter only. *Hill*, 20 (4 D. & B.), 491.

DEATH FROM WANT OF CARE AFTER WOUND GIVEN.—Where the wound is adequate and calculated to produce death, it is no excuse to show that had proper caution and attention been given a recovery might have ensued. Neglect or maltreatment will not excuse except in cases where doubt exists as to the character of the wound. *Baker*, 46 (1 Jones), 267.

REQUIRING PRISONER TO STAND UP.—The omission to require the prisoner charged with a capital felony to stand up and look upon the jury on the return of the verdict, does not affect the verdict or judgment thereon. *Pankey*, 104—840.

SON FIGHTING FOR FATHER.—While a son may fight in the necessary defence of his father, yet his act must receive the same construction as the act of the father would have received. *Brittain*, 89—481.

PLEADING INSANITY.—On indictment for murder, defendant pleaded: "I admit the killing, but was insane at the time of the commission thereof, therefore not guilty." The court rejected all the plea except "not guilty:" *Held*, no error, since under the plea of not guilty, every defence to the charge embraced in the rejected part of the plea was admissible. *Potts*, 100—457.

A plea in abatement for incompetency of one of the grand jurors comes too late after pleading to the indictment. *Ibid*.

ORDER OF EXAMINATION OF WITNESSES.—The state is not bound to examine all the witnesses who were present at the commission of the homicide or all who were sent to the grand jury. *Martin*, 24 (2 Ired.), 101.

WORDS OR GESTURES.—No words or gestures, nor anything less than the indignity to the person of a battery, or an assault, at least, will extenuate a killing to manslaughter. *Barfield*, 30 (8 Ired.), 344.

AIDER AND ABETTOR, WHO IS.—One who is present and sees that a felony is about to be committed and does in no manner interfere, does not thereby participate in the felony committed. Everyone may, on such occasion, interfere to prevent, if possible, the perpetration of the felony, but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary in order to make him an aider or abettor that he should do or say something showing his consent to the felonious purpose and contributing to its execution. *Hildreth*, 31 (9 Ired.), 440.

CORPUS DELICTI.—The rule which seems at one time to have prevailed in England, "that upon charges of homicide, the accused shall not be convicted unless the death be first distinctly proved, *either by direct evidence of the fact, or by inspection of the body*," is not of universal application, but where the identity of the body is completely destroyed by fire or other means, the *corpus delicti*, as well as other parts of the case, may be proved by presumptive or circumstantial evidence. *Williams*, 52 (7 Jones), 446.

BURDEN ON DEFENDANT TO SHOW INSANITY.—Where insanity is relied on as a defence, the burden is on the defendant to establish it to the satisfaction of the jury. *Potts*, 100—457.

DIPSOMANIA AND MORAL INSANITY.—While the law recognizes *delirium tremens* as a species of insanity, "dipsomania" and "moral insanity" are not recognized as defences. *Potts*, 100—457.

PRESENCE OF PRISONER IN COURT.—Where on the removal of a trial for murder, the record shows that the prisoner was arraigned, and then the order of removal immediately follows, before any order remanding the prisoner, it necessarily appears by implication that the prisoner was in court when such order was made. *Anderson*, 92—732.

Where the jury return a verdict finding the *prisoner at the bar* guilty, and the clerk records the verdict as against the *prisoner at the bar*, the record sufficiently shows the presence of the prisoner in court when the verdict was rendered. *Collins*, 30 (8 Ired.), 407.

Where the record shows that the prisoner was brought to the bar in custody of the sheriff, and then, after setting out the drawing of the jury, and their verdict, contains an entry that "the prisoner is remanded," the presence of the prisoner during the whole trial appears with judicial certainty. *Langford*, 44 (Bush.), 436.

RES GESTAE.—No declarations of a prisoner, made after the commission of the homicide, as to the manner of the transaction, that are not part of the *res gestae*, are admissible for him. *Brandon*, 53 (8 Jones), 463.

EVIDENCE—BURDEN OF SHOWING MATTERS IN MITIGATION.—The killing with a deadly weapon being admitted or proved, the burden of showing any mat-

ter in mitigation, excuse or justification is thrown on the prisoner, and it is incumbent on him to establish such matter, not beyond a reasonable doubt, nor by a preponderance of the testimony, but to the satisfaction of the jury. *Willis*, 63—26.

Facts offered by the accused in mitigation or excuse need not be proved beyond a reasonable doubt, but only to the satisfaction of the jury. *Byrd*, 121—684.

Where the wilful killing has been admitted or proved beyond a reasonable doubt, the burden rests upon the prisoner of showing such facts as he relies upon in mitigation or excuse, and for such purpose he has the equal benefit of all the evidence in the case whether introduced by himself or by the state; but, though such mitigating facts be shown as will reduce the crime to manslaughter, the burden is still on him to show such further facts as will excuse the homicide before he can be entitled to an acquittal. *Byrd*, 121—684.

VARIANCE.—Where the indictment charges the killing to have been done with a piece of plank, and the proof is that it was done with a piece of iron, the variance is not fatal. *Weddington*, 103—364.

Where the indictment charges that the mortal wound was inflicted with a rock, and the proof is that the instrument used was a stick, there is no variance. *Gould*, 90—658.

Though it is necessary to allege the day of the stroke as well as that of the death, in order to show that the death occurred within a year and a day after the stroke, yet where the indictment alleges that the blow was given on a certain day, and that deceased then and there *instantly died*, and the evidence is that he lived for twenty days after receiving the blow, there is no variance. *Baker*, 46 (1 Jones), 267.

Where the indictment charged the killing to have taken place on December 5, 1896, and the evidence showed that, while the deceased was wounded on that day, he died three days thereafter and before the bill was found, the variance was not fatal. *Pate*, 121—659.

ARREST OF JUDGMENT.—The prisoner was indicted at one term and tried and convicted at a succeeding term, both being held by the same judge. He moved for a new trial and in arrest of judgment, which being refused and judgment pronounced, he appealed to the supreme court, where the judgment was affirmed. When brought before the superior court for sentence, he again moved in arrest of judgment on the ground that the judge who presided at the trial also presided at the preceding term, when the bill was found, in violation of Const. N. C., art. 4, sec. 11: *Held*, (1) that the judgment of the superior court was conclusive of all ground which was or might have been insisted on to arrest judgment. (2) That if the prisoner was entitled to relief at all on such ground, his proper remedy was not by motion in arrest of the judgment, but by a proper application for a discharge. (3) The constitutional prohibition does not apply to the several terms of the court in any one county embraced in a "circuit," but only to the series of courts held in the various counties constituting such circuit as a whole. (4) The judge was at least an officer *de facto*, and, so far as third parties are concerned, his acts were as binding as if he were an officer *de jure*. *Speaks*, 95—689.

It is no cause for arrest of judgment that the record states that the prisoner, upon arraignment "for his trial puts himself on his country," instead of saying that he would "be tried by God and the country." *Reeves*, 30 (8 Ired.), 19.

It is no ground for the arrest of judgment because, on the removal of a case, two transcripts are sent, although the first is defective, and the clerk sends the second without a *certiorari*, since the clerk can do so of his own motion. *Anderson*, 92—732.

Nor can judgment be arrested because the bill does not charge that deceased "was in the peace of God" as well as in the peace of the state. *Gee*, 92—756.

An allegation that deceased "then and there instantly died," is a sufficient averment that he died within a year and a day. *Howard*, 92—772.

The fact that the record used the past tense instead of the present is no cause for arrest of judgment. *Reeves*, 30 (8 *Ired.*), 19.

CHALLENGE.—The usual question asked a juror on his *voir dire*, "have you formed and expressed the opinion that the prisoner at the bar is guilty," refers to every grade of unlawful homicide, and it is not error to refuse to allow the juror to be asked whether he had formed and expressed the opinion that the prisoner is "guilty of either murder or manslaughter." *Matthews*, 80—417.

DEADLY WEAPON.—Whether the weapon used is a deadly weapon, is a question entirely for the court. *Collins*, 30 (8 *Ired.*), 407.

The question as to whether an instrument is a deadly weapon is, generally speaking, one for the court. *West*, 51 (6 *Jones*), 505.

HEREDITARY INSANITY.—Where hereditary insanity is offered as an excuse for crime, it must appear that the kind of insanity proposed to be proven as existing in the prisoner is no temporary malady, but that it is notorious, and of the same species with which other members of the family have been afflicted. *Christmas*, 51 (6 *Jones*), 471.

ACCOMPLICE.—Where one person employs another to commit a robbery, and the one employed kills the person robbed to conceal the offence, the one who employs him is guilty of murder as accessory before the fact. *Davis*, 87—514.

PREPARED WEAPON USED ON PROVOCATION.—Though legal provocation be given defendant, yet if it be shown that he previously procured a weapon for the express purpose of using it, if he should get into a fight with deceased at a particular time or place, or on a certain contingency, and at the appointed time or place, or on the happening of the contingency, the accused slay the deceased with the weapon, the offence would ordinarily be murder. *Miller*, 112—878. *Hogue*, 51 (6 *Jones*), 381.

KILLING PERSON ORDERED OFF.—Where one goes to the house of another in a peaceable manner, without offering or threatening violence to his person or dwelling, and upon being ordered off and not going immediately, is killed by the owner of the premises, the slayer is guilty of murder, although he had previously forbidden the deceased from coming on his premises. *Smith*, 20 (3 *D. & B.*), 118.

HOUSE OF ILL FAME.

See **BAWDY HOUSE**.

HUNTING.

Sec. 252 (1058). Hunting for deer by fire-light. R. C., c. 34, s. 95. 1784, c. 212, ss. 1, 3. 1801, c. 595. 1856-'7, c. 24. 1879, c. 92.

If any person shall hunt for deer with a gun or guns in the woods in the night-time, by fire-light, the person so offending shall be guilty of a misdemeanor, and shall pay a fine not exceeding fifty dollars, or be imprisoned not exceeding thirty days.

Sec. 253 (1059). Hunting by fire-light, accomplices. R. C., c. 34, s. 96. 1774, c. 103.

When more persons than one are engaged in committing the offence of fire-hunting, any one may be compelled to give evidence against all others concerned; and the witness, upon giving such information shall be acquitted and held discharged from all penalties and pains to which he was subject by his participation in the offence. . .

Sec. 254 (2831). Penalty for hunting on land of another after advertisement forbidding it. R. C., c. 16, s. 4. 1784, c. 212, ss. 5, 7. 1887, c. 367. 1895, c. 147. 1895, c. 384.

Any person who shall hunt, with guns or dogs, or who shall catch or attempt to catch fish in any manner whatsoever, on the lands of another, without leave obtained from the owner, shall for every offence forfeit and pay ten dollars to the party aggrieved: *Provided*, no such recovery shall be had, unless the owner of the land, by advertisement posted up at the court-house door of the county, and at three or more place on the land, has forbidden the person so hunting, by name, or all persons generally, to hunt on his land. And all persons hunting after having been so forbidden shall be guilty of a misdemeanor, and fined not exceeding ten dollars, or imprisoned not exceeding ten days for the first offence, and upon conviction of a second or subsequent offence, shall be fined twenty-five dollars or imprisoned thirty days at the discretion of the court.

[NOTE.—The words in first line “or who shall catch or attempt to catch fish in any manner whatsoever” do not apply to the counties of Currituck, Dare, Hyde, Carteret, Pamlico, Chowan, Beaufort, Perquimans, Pasquotank and Craven.]

Sec. 255 (2832). Penalty for hunting or killing deer during certain months. 1871-'2, c. 68, s. 1. 1876-'7, c. 30. 1889, c. 531.

Any person who shall hunt with gun, or chase with a dog, or shall kill or destroy any deer running wild in the woods, between the first day of February and the first day of October next thereafter en-

suing, unless in an enclosure surrounded by a sufficient fence, at least five feet high, and where such person shall have a lawful right so to do, shall pay a penalty of fifty dollars for each offence to any person suing for the same, one-half for his use and the other for the use of the public school of the school district wherein the offence is committed, and shall be guilty of a misdemeanor.

Sec. 256 (2834). Unlawful to kill, etc., certain birds within certain dates. 1874-'5, c. 195. 1881, c. 254. 1885, c. 399. 1889, c. 32. 1891, c. 79.

No person shall kill or shoot, trap or net any partridges, quail, doves, robins, larks, mocking-birds or wild turkeys, between the fifteenth day of March and the first day of November in each year; and the person so offending shall be guilty of a misdemeanor, and fined not exceeding ten dollars for each offence: *Provided*, that this section shall not apply to the counties of Cherokee, Swain, Clay, Graham, Macon, Jackson, Transylvania, Henderson and Montgomery.

[NOTE.—By Laws 1891, c. 232, the word "doves" is stricken out as to Edgecombe county, and by Laws 1889, c. 32, the words "doves, robins and larks" are stricken out as to the counties of Craven, Cumberland and Duplin, and the following proviso added: "*Provided*, nothing in this section shall be so construed as to prevent the farmers of Craven, Cumberland and Duplin counties from shooting partridges or quail on their own premises when the same are doing injury to their crops."]

Sec. 257 (2835). Unlawful to export or transport quail or partridges from the state. 1876-'7, c. 195. 1880, c. 57.

No person shall export or transport from the state any quail or partridges, whether dead or alive, and any person violating this section shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not more than thirty days for each offence.

Sec. 258 (2836). Unlawful to take or destroy eggs of quail or partridges; misdemeanor; penalty. 1881, c. 220, ss. 2, 3.

No person shall at any time take or destroy the eggs of partridges or quail; and any person violating this section shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or by imprisonment not more than thirty days.

Sec. 259 (2837). Restrictions on hunting wild fowl on Sunday, or at night, etc. 1870-'1, c. 27, s. 2. 1874-'5, c. 259.

No person shall hunt or shoot wild fowl on the Lord's day, commonly called Sunday; or hunt or shoot them on any day of the week after the hour of sunset and before the hour of daylight,

with gun or fire, or use any gun other than can be fired from the shoulder.

Sec. 260 (2838). Penalty for violation of the preceding section; fines to go to school fund of the county; justices of peace to issue warrants. 1870-'1, c. 27, ss. 4, 5, 6. 1874-'5, c. 259.

Any person violating the preceding section shall be guilty of a misdemeanor, and fined not less than one hundred dollars or imprisoned not less than thirty days. And all fines collected or imposed under this section shall go to the common school fund of the county: *Provided*, any person giving information of the violation of said preceding section to the proper persons shall, upon conviction of the parties, be entitled to receive one-half of said fine.

It shall be the duty of the justice of the peace, upon information of the violation of the preceding section, to issue his warrant for the arrest of the offender, and, if found guilty by him, he shall bind him over in such sum as he thinks proper (provided that such amount shall not exceed two hundred and fifty dollars) to the next term of any court having jurisdiction.

Sec. 261 (2839). Hunting with fire prohibited; penalty; informer to receive half of fine. 1868-'9, c. 250, s. 1. 1874-'5, c. 235.

Any person hunting wild fowl with fire shall be guilty of a misdemeanor, and fined not less than twenty nor more than fifty dollars, and shall be imprisoned not less than ten nor more than thirty days; and any person who shall inform the court or solicitor of the district, or any justice of the peace, of the name of any person violating this section, shall be entitled, upon conviction of the defendant, to receive one-half of said fine.

Sec. 262 (3783). Hunting on Sunday prohibited; penalty on failure to pay fine. 1868-'9, c. 18, ss. 1, 2.

If any person shall be known to hunt on Sunday with a dog, or shall be found off his premises on Sunday, having with him a shotgun, rifle or pistol, he shall be guilty of a misdemeanor, and pay a fine not exceeding fifty dollars, two-thirds of such fine to inure to the benefit of the public schools in the county of which such convict is a resident, the remainder to the informant; and upon failure of such convict to pay the required fine, he shall be imprisoned at hard labor for not more than three months, as the court shall direct: *Provided*, that this section shall not apply to any person who may violate its provisions in defence of his own property.

HUSBAND AND WIFE.

Sec. 263 (972). Adequate support; failure of husband to provide for wife and children. 1868-'9, c. 209, s. 2. 1873-'4, c. 176, s. 11. 1879, c. 92. 1889, c. 504. 1893, c. 83.

If any husband while living with his wife shall wilfully neglect to provide adequate support for such wife or the children which he has begotten upon her, he shall be guilty of a misdemeanor.

IDEM SONANS.

See FORGERY—LARCENY.

ILLEGAL VOTING.

UNCOMMUNICATED OPINION OF JUDGES.—Where a person living in one county voluntarily votes in another, the unlawful purpose *prima facie* attaches to the act, and the fact that the judges of election discussed the question among themselves and decided that he had a right to cast such vote, such discussion not being heard by defendant, nor the opinion communicated to him, can not take away the criminality of the act. Hart, 51 (6 Jones), 389.

DECISION OF JUDGES IN FAVOR OF VOTER.—The decision of the judges of election that a person is entitled to vote is a complete defence to an indictment for illegal voting, although such person may not in fact be entitled to vote. Distinguishing *State v. Boyett*, 10 Ired., and *State v. Hart*, 6 Jones, 389. Pearson, 97--434.

ADVICE NO EXCUSE.—On indictment for knowingly and fraudulently voting at an election, it is no excuse to show that defendant was advised by a very respectable gentleman that he had a right to vote, since "ignorance of the law excuses no man." *Boyett*, 32 (10 Ired.), 336.

IRREGULAR ELECTION NO DEFENCE.—One who votes illegally can not defend himself against an indictment on the ground that the election was conducted irregularly. *Cohon*, 34 (12 Ired.), 178.

INCEST.

Sec. 264 (1060). Incest; carnal intercourse between grandparent and grandchild, parent and child, brother and sister, a felony. 1879, c. 16, s. 1.

In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister, of the half or whole blood, the parties shall be guilty of felony, and punished for every such offence by imprisonment in the county jail or penitentiary for a term not exceeding five years, in the discretion of the court.

NOT INDICTABLE PRIOR TO ACT.—Before the passage of this statute, in 1879, incest was not indictable in this state. Keesler, 78—469.

INDICTMENT—ILLEGITIMATE CHILD—VARIANCE.—Where the indictment charges that defendant had carnal intercourse with his "daughter," and the proof is that the person alleged to be the daughter is defendant's illegitimate child, there is no variance, and defendant is guilty. Lawrence, 95—659.

Where a wife, on threats of her husband to leave her, confessed to having committed incest, such confession being a confidential communication, is inadmissible, and its subsequent repetition to a third person under similar circumstances, in the presence of the husband, is incompetent on the trial of the wife and another for incest. Brittain, 117—783.

Sec. 265 (1061). Incest; carnal intercourse between uncle and niece, nephew and aunt, a misdemeanor. 1879, c. 16, s. 2.

In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and punished by fine or imprisonment, in the discretion of the court.

INDICTMENT.

See each particular title.

Sec. 266 (1183). Formal objections or stay of judgment shall not quash indictments, informations and impeachments. R. C., c. 35, s. 14. 37 Hen. VIII., c. 8. 1784, c. 210, s. 2. 1811, c. 809.

Every criminal proceeding by warrant, indictment, information, or impeachment, shall be sufficient in form for all intents and purposes, if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the court to proceed to judgment.

TRIAL BEFORE TWO JUSTICES.—An indictment for perjury alleged to have been committed at a trial in a justice's court can not be quashed because the names of the justices are given in addition to the name of the court, since the addition is mere harmless surplusage. *Flowers*, 109—.

FORM OF INDICTMENT WHEN STATUTE AMENDED SINCE THE COMMISSION OF THE OFFENCE.—When material parts of a statute are repealed by a subsequent amendatory statute, an indictment for an offence committed before the amendment made should charge that the offence was committed *before* the date of the ratification of the amendatory act. *Massey*, 97—465.

CAPTION.—A misrecital of the proper county in the caption of an indictment furnishes no ground for arrest of judgment. *Sprinkle*, 65—463.

THE WORD "COUNT" USED FOR "COUNTY."—Where the indictment says defendant is of a certain county, and that he committed the offence in the "count" aforesaid, the word "count" may be read *county*, since the informality is cured by the statute. *Evans*, 69—40.

DESCRIPTIO PERSONAE.—The addition of "Jr." to a name in an indictment is mere *descriptio personae*, and it is not a variance for the name to be stated in the evidence without the addition. *Best*, 108—747.

ACT OF ASSEMBLY.—An indictment concluding against the "act of assembly," is sufficient. *Tribatt*, 32 (10 Ired.), 151.

TITLE OF ACTION.—A criminal action may be entitled on the records of the court either as "The People v. A B—Criminal action," or the "State v. H B—Indictment." *Simons*, 68—378.

CONCLUSION AGAINST THE "FORCE" OF STATUTE.—An indictment concluding against the "force" instead of the "form" of the statute is sufficient. *Davis*, 80—384.

CONCLUSION OF INDICTMENT.—An indictment, whether for a common law or a statutory offence, which does not conclude "against the peace and dignity of the state," is fatally defective. Overruled in *State v. Kirkman*, 104—911. *Joyner*, 81—534.

It is not necessary that an indictment should conclude "against the peace and dignity of the state." Overruling *State v. Joyner*, 81—534, on this point. *Kirkman*, 104—911.

OBJECT OF THE STATUTE.—This section was intended to uphold the execution of public justice by freeing the courts from the fetters of form, technicality and refinement which do not concern the substance of the charge and the proof to support it. *Barnes*, 122—1031.

The omission of the words "with intent" in an indictment for assault with intent to commit rape is not ground for arrest of judgment where the other usual averments are used. *Barnes*, 122—1031.

Where an act is made an offence by statute, without reference to the intent, a charge in an indictment that it was wilfully done is surplusage, and the intent need not be proved. *Railway*, 122—1052.

An indictment for perjury must allege that it was done feloniously. *Bunting*, 118—1200.

An indictment concluding "against the peace and dignity," omitting the words "of the state," is sufficient, since the defect is cured by the statute. *Parker*, 81—531.

ONE SECTION OF STATUTE USING GENERAL TERMS AND ANOTHER SPECIFIC.—Where an offence is prohibited in general terms in one section of the statute, and in another and entirely distinct section the acts of which the offence consists are specified, it is not necessary that anything but the general description should be set out in the indictment. *Van Doran*, 109—.

Where a statute makes two or more distinct acts, constituting separate stages of the same transaction, indictable, both or all may be charged in a single count of the indictment. Van Doran, 109—.

But if the distinct acts, representing the successive stages of the transaction, are connected in the statute by the word "or," the independent clauses may be coupled by the word "and," instead of following closely the language of the statute and using the disjunctive "or." Van Doran, 109—.

The use of the disjunctive "or" is only fatal when the use of it renders the statement of the offence uncertain, but it is not so when one term is used only as explaining or illustrating the other, or where the language of the statute makes either an attempt or procurement of an act, or the act itself, in the alternative, indictable. Van Doran, 109—.

FELONIOUSLY.—The word "feloniously" must always be used in indictments for felonies. Purdie, 67—25.

Sec. 267 (1184). Substance of proceedings to be set forth in indictments, etc. R. C., c. 35, s. 15.

In every indictment, information, or impeachment in which, by the common law, it may be necessary to set forth at length the judicial proceedings had in any case then or formerly pending in any court, civil or military, or before any justice of the peace, it shall be sufficient to set forth the substance only of said proceedings, or the substance of such part thereof as make, or help to make, the offence prosecuted.

Sec. 268 (1187). Indictment for second offence; how first conviction to be stated. R. C., c. 35, s. 18.

In any indictment for an offence which, on the second conviction thereof, is punished with other or greater punishment than on the first conviction, it shall be sufficient to state that the offender was, at a certain time and place, convicted thereof, without otherwise describing the previous offence; and a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction.

Sec. 269 (1188). Indictment; how stated; when ownership of property is held in common. R. C., c. 35, s. 19.

If any indictment wherein it shall be necessary to state the ownership of any property whatsoever, whether real or personal, which shall belong to, or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any such indictment, it shall be necessary to mention,

for any purpose whatsoever, any partners, joint-tenants or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall extend to all joint stock companies and trustees.

FATAL VARIANCE.—Where the indictment charges the injury of a cow, the property of L S and others, and the proof is that L S is the exclusive owner, the variance is fatal. Hill, 79—656.

VARIANCE NOT FATAL.—Where property is charged in an indictment for larceny as belonging to A and another and it is proved on the trial to be the property of A and B, a firm well-known in the community, the apparent variance is cured by this act. Capps, 71—93.

USING THE DISJUNCTIVE "OR."—An indictment for larceny which charges the thing taken to be the property of "J D R and another or others," is fatally defective. Harper, 64—129.

Sec. 270 (1189). Indictment, certain defects of, not to vitiate. R. C., c. 35, s. 20.

No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed, or reversed for the want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statutes," instead of the words "against the form of the statute," or *vice versa*; nor for omission of the words "against the form of the statute," or "against the form of the statutes," nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offence.

A defect in an indictment for homicide in stating that deceased died in a certain year, when, in fact, he died the year before, is cured by the statute. Jones, 80—415.

The omission of the word "year" in an indictment for the removal of a crop where the renting is charged to have been "for the term of one," omitting the word "year," does not vitiate the indictment. Walker, 87—541.

It is not necessary that an indictment should conclude "against the peace and dignity of the state." Overruling *State v. Joyner*, 81 N. C., 534, on this point. Kirkman, 104—911.

A conclusion against the form of the *statute* instead of *statute* is no ground for arrest of judgment. Smith, 63—234.

Laws conferring, withdrawing or limiting jurisdiction over pre-existing common law offences do not become a constituent part of the offences to which they apply, and indictments under such statutes need not conclude against the form of the statute. Williamson, 81—540.

Sec. 271 (1191). Intent to defraud, what statement and proof sufficient; in same indictment, defendant may be charged with counts for receiving stolen goods and with larceny. R. C., c. 35, ss. 21, 23. 1852, c. 87, s. 2. 1874-5, c. 62.

In any case, where an intent to defraud is required to constitute the offence of forgery, or any other offence whatever, it shall be sufficient to allege, in the indictment, an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient, and not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city, town, or parish, or body corporate, or any public officer, in his official capacity, or any co-partnership or member thereof, or any particular person. The defendant may be charged in the same indictment in several counts with the separate offences of receiving stolen goods, knowing them to be stolen, and larceny.

INDICTMENT—GENERAL.

NEW BILL MAY BE SENT.—A bill of indictment returned “not a true bill” can not be reconsidered by the same grand jury, but a new bill may be sent. Brown, 81—568.

Where a bill is ignored, a new one charging defendant with the same offence may be sent to the same grand jury, and the same and additional evidence produced to support it. Harris, 91—656.

The state is not restricted to the first indictment found, but may at any time before trial send another and require defendant to answer that. Dixon, 78—558.

NO AMENDMENT WITHOUT SENDING TO GRAND JURY.—Indictments are not within the operation of the statute of jeofails, and can not be amended without concurrence of the grand jury. Sexton, 10 (3 Hawks), 184.

BILL OF PARTICULARS.—Where the indictment does not convey sufficient information to enable the defendant to prepare for his trial, he may apply to the prosecuting officer for a bill of particulars, and if refused he may apply to the court to direct that a bill of particulars be furnished. Brady, 107—822.

ACCOMPLICE WHO TESTIFIES MAY AFTERWARDS BE INDICTED.—The fact that an accomplice is introduced as a witness and testifies to such facts as are within his knowledge, withholding nothing because of its tendency to criminate himself, does not constitute a legal defence to a prosecution against him. He has an equitable claim to executive clemency, or the solicitor may enter a *nol pros*. Lyon, 81—600.

SIGNING NOT NECESSARY.—An indictment need not necessarily be signed by any one, or if signed by an attorney other than the regular solicitor, it is sufficient. Mace, 86—668.

THE WORD "FELONIOUSLY" MUST BE USED IN FELONIES.—The word "feloniously" is absolutely necessary in every indictment charging a felony, and it can not be dispensed with or its use supplied by any circumlocution. Rucker, 68—211.

A MISTAKE IN MARKING "A TRUE BILL," HOW SHOWN.—If a bill of indictment be endorsed "a true bill" by mistake, when the grand jury had ordered their clerk to endorse it "not a true bill," the defendant may show that fact by affidavit or otherwise, either upon a motion to quash or plea in abatement, and thereupon the indictment should be quashed. Horton, 63—595.

BAIL MAY BE REQUIRED WHEN BILL IS QUASHED.—Where an indictment is quashed, it is competent and proper for the court to require the defendant to give bail to answer another indictment for the same offence. Griffice, 75—316.

NAME OF PERSON UNKNOWN.—Although the name of the person on whom an offence is charged to have been committed be to the jurors unknown, yet the proof must identify the party injured as completely as if his real name appeared in the indictment. Trice, 88—627.

EFFECT OF VARIANCE.—The effect of a variance between the allegation and proof is to vacate the verdict and leave the defendant charged as before and liable to be tried again. Sherill, 82—694.

VERDICT SET ASIDE—NEW BILL.—Where, after verdict and judgment against defendant, the court set the same aside and granted a new trial, it is allowable to put the defendant upon trial on a new indictment found at the same term, upon the same testimony of the same witnesses, the two bills being treated as several counts in the same indictment. Lee, 114—844.

SECOND BILL AT SAME TERM.—Where an indictment is of doubtful validity it is proper practice to send a second bill at the same term at which the first stood for trial. Lee, 114—844.

GENERAL VERDICT ON TWO COUNTS, ONE DEFECTIVE.—Where there are two counts, one good and the other defective, and a general verdict of guilty is rendered, the presumption is that the conviction was upon the good count and that the evidence supported the conviction. Edwards, 113—653.

When there are two bills found at the same term and the defendant is tried and convicted upon both, the two bills constitute, in effect, counts in the same bill, and if either is good it supports the verdict. Perry, 122—1018.

WHEN CAPTION TO INDICTMENT NECESSARY.—A caption to an indictment is necessary only when the court acts under a special commission, since when the court sits by authority of a public law everybody must take notice of it, and it is not necessary specially to set forth the power of the court. Wasden, 4 (Tay. Term), 596.

DUPPLICITY.—Duplicity in a bill of indictment is ground only for a motion to quash, and being cured by verdict, is not ground for a motion in arrest of judgment. Wilson, 121—650.

DUPPLICITY CURED BY VERDICT.—An indictment for larceny containing but one count, charging the ownership of the property stolen as 100 pounds of cotton the property of C, 100 pounds cotton the property of G, is bad for duplicity and obscurity, but if objection is not taken by motion to quash in apt time the defect is cured by the verdict. Simons, 70—336.

While a bill containing unnecessary averments is bad for duplicity such defects are cured by a verdict. Hart, 116—976.

CONSOLIDATION OF INDICTMENTS.—Where the defendant is charged in four separate indictments with larceny, the court may conso..date and

treat them as if the several offences charged had been embraced in one indictment containing different counts. Such consolidation, however, should only be allowed in cases where the presiding judge is satisfied that the ends of justice require it, and the solicitor should be forced to elect on which bill he asks for a conviction before the defendant is required to give his evidence. McNeill, 93—552.

The finding of a new bill for the same felony, varying the terms in which the offence is charged, is simply adding a new count, and the whole constitutes but one proceeding. Johnson, 50 (5 Jones), 221.

NEGATIVE PROVISIO.—The general rule as to the form of statutory indictments is that it is not requisite, where they are drawn under one section of the act to negative an exception contained in a subsequent distinct section of the same statute. Harris, 119—811.

"THEN AND THERE."—The words "then and there" in an indictment have reference only to the time and to the venue, and not to any public place before mentioned. Langford, 25 (3 Ire.), 354.

THE TIME.—All that is necessary as regards laying the time in an indictment is that the offence appear to have been committed before the finding of the bill, except in those cases where time forms part of the offence. Haney, 8 (1 Hawks), 460.

The date in an indictment is not material. Williams, 117—753.

CHANGING OFFENCE.—The court has no power to change an indictment so as to charge an offence entirely different and calling for a punishment entirely different from and not included in that passed upon by the grand jury, and no consent or submission of the defendant can give the court jurisdiction of the substituted offence. Jones, 101—719.

QUASHING.—A motion to quash made after verdict can not be entertained. Barbee, 93—498.

After a motion to quash an indictment containing two counts, one of which is defective, the solicitor may enter a *not pros.* as to the defective count, and try on the other. Buchanan, 23 (1 Ire.), 59.

The judges are in no case bound, *ex debito justitiæ*, to quash an indictment however defective, but may require the defendant either to plead or demur, and it is a general rule that no indictment will be quashed which charges the higher offences, as treason or felony, or those crimes which immediately affect the public, as perjury, forgery and like offences. In such cases the court will hold the prisoner and permit the solicitor to send a new bill curing the defect. Quashing, though allowable, is not favored, since it releases recognizances and sets defendants at liberty when they ought to be held. Flowers, 109—.

A bill charging a felony should not be quashed, but the defendant should be held until a new bill can be sent. Caldwell, 112—854.

GRAND JUROR SERVING AS JUROR ON THE TRIAL.—The fact that a member of the grand jury which returned a true bill for perjury was one of the petit jury that tried the issues in an action wherein it was charged the perjury was committed, is no ground for abating or quashing the indictment. Wilcox, 104—847.

MOTION TO QUASH.—A motion to quash made after verdict can not be entertained. Barbee, 93—498.

Where there are two defendants, and the bill shows that they were "sworn and examined," and the grand jury ignored the bill as to one and found a true bill as to the other, there is no presumption of law that the latter defendant was examined against himself, and a motion to quash and to arrest judgment on this account were both properly refused. Frizell, 111—722.

INFANTS.

An infant under fourteen years of age is not liable to indictment for an ordinary misdemeanor unless the facts exhibit brutal passion, the use of a deadly weapon, the infliction of maim, or other acts of like character. Yeargan, 117—706.

The rule as to the liability of infants for crime is

1. Under seven years of age an infant can not be indicted and punished for any offence;

2. Between seven and fourteen an infant is presumed to be innocent, but the presumption in certain cases may be rebutted. The cases in which such presumption may be rebutted and the accused punished when under fourteen are such as an aggravated battery as in maim, or the use of a deadly weapon, or in numbers amounting to a riot, or a brutal passion as in an attempt at rape, and the like. In such cases malice and wickedness supply the want of age, and if defendant be *doli capax* he must be punished. Yeargan, 117—706.

An infant between seven and fourteen years of age may be punished for a maim if found *doli capax*. Yeargan, 117—706.

An infant under the age of fourteen years, who played at a game of chance called "shooting craps," well knowing the difference between right and wrong, but who did not know the act was unlawful, is not indictable for gambling. Yeargan, 117—706.

An infant is not indictable for disposing of mortgaged property, since the alleged disposition amounts to a disaffirmance of the contract. Howard, 88—650.

An infant between seven and fourteen years of age may be punished for an aggravated battery with a deadly weapon if he be *doli capax*. Yeargan, 117—706.

The question as to whether a witness has sufficient mental capacity and sense of moral obligation to testify in a case is one of fact to be determined by the court, and can not be reviewed on appeal. Edwards, 79—648.

Whether an infant has sufficient intellect and sense of the obligation of an oath to be competent as a witness is a matter within the discretion of the trial judge, and his action is not reviewable. Manuel, 64—601.

The court is the exclusive judge whether a witness has sufficient intelligence to testify. Perry, 44 (Busb.), 330.

Where the defence is that defendant is under age of presumed capacity the burden lies upon him. If the age can be ascertained by inspection the court and jury may decide. Arnold, 35 (13 Ire.), 184.

See also MINORS—As witnesses see EVIDENCE, subdivision INFANTS.

INJURING PERSON IN ANOTHER STATE.

Sec. 272. Any person injuring another person in another state guilty of a crime. 1895, c. 169.

SECTION 1. If any person, being in this state, shall unlawfully and wilfully put in motion a force, from the effect of which any person shall be injured while in another state, the person so setting such force in motion shall be guilty of the same offence in this state, as he would be if the effect had taken place within this state.

Where one puts in force an agency for the commission of crime he, in legal contemplation, accompanies the same to the point where it becomes effectual; the criminal act is the impinging of the weapon on the party injured, and that is where the impingement happens; therefore, where one, standing in North Carolina, by the firing of a bullet, killed another standing in Tennessee, the assault or stroke was in the latter state and at common law the murder was committed in that state, and its courts alone have jurisdiction of the offence. Hall, 114—909.

Where the fatal stroke and death occur in the same state, the offence of murder at common law is there complete, and the courts of that state can alone try the offender for that specific common law crime. Hall, 114—909.

(This case was decided prior to the enactment of the foregoing statute.)

INJURY TO PROPERTY.

See also INJURY TO STOCK AND STOCK LAW AND FENCES.

Sec. 273

(1062). Injuries to houses, churches and fences. R. C., c. 34, s. 103.

If any person shall, by any other means than burning or attempting to burn, unlawfully and wilfully demolish, destroy, deface, injure, or damage any of the houses or buildings previously mentioned in this chapter; or shall unlawfully and wilfully burn, demolish, pull down, destroy, deface, damage, or injure any church, uninhabited house, outhouse, or other house or building not mentioned before in this chapter; or shall unlawfully and wilfully burn, destroy, pull down, injure or remove any fence, wall, or other inclosure, or any part thereof surrounding or about any yard, garden, cultivated field or pasture, or about any church, grave-yard, factory, or other house in which machinery is used, every person so offending shall be guilty of a misdemeanor.

STATUTE NOT IN CONFLICT WITH SECTION 642.—There is no conflict between this section and section 642, and an indictment charging that defendant did cut and destroy "a wire fence enclosing a pasture," may be sustained under the above section. Biggers, 108—760.

TENANTS.—This section does not embrace the case of injury to a building by a lessee during the continuance of his term. Whitener, 92—798.

The husband of the prosecutrix leased a field of defendant under an agreement by which the husband was to put a fence around the field, which he did. The husband died and prosecutrix continued in possession up to the fence, but the fence in fact was a division fence between prosecutrix and another tenant of defendant. Defendant, upon notice to the prosecutrix, removed the fence, she forbidding the removal: *Held*, that defendant was guilty. Piper, 89—551.

Where the tenant of the prosecutor in possession of a house simply goes out of the same, and takes a lease from the defendant, and then goes back professedly under the lease from defendant, his relation as tenant to the prosecutor remains, his possession as tenant not having been surrendered to the original landlord; and where, in such case, the prosecutor, after an abandonment of the premises by the tenant, goes to the house and stores his fodder and some tools in it and fastens the doors, and the defendant afterwards goes to the house and bursts open the door, defacing it by splitting off part of the facing, and takes up the sleepers in one of the rooms and puts his mules in there, the defendant is guilty of wilful injury to the house, though he had a deed to the premises older than that under which the prosecutor claimed, and had been advised by his attorney to enter and take possession, since his taking such a violent and injurious possession of the house while the prosecutor was so in possession was a wilful injury to the house, and the question of a *bona fide* belief that he was the owner and had a right to enter does not apply. Howell, 107—835.

PERSON ENTERING MUST BE A TRESPASSER.—One who peaceably enters on land and erects houses thereon under the belief that he had the right to do so, but, being still in possession, tears them down and removes them on discovering that he was on the lands of another, is not such a trespasser as would make him guilty. Reynolds, 95—616.

PROSECUTOR MUST HAVE POSSESSION.—Where the prosecutor has neither the actual nor constructive possession of the houses demolished, defendant must be acquitted. Reynolds, 95—616.

WHAT CONSTITUTES A "CULTIVATED FIELD."—A piece of land cleared, fenced and used for cultivation according to the ordinary course of husbandry, although nothing may be growing thereon at the time of the trespass, is a "cultivated field" within the meaning of the statute. McMinn, 81—585.

A field in a course of preparation for making a crop, though no crop is actually planted, is a cultivated field within the meaning of the statute. Allen, 35 (13 Ired.), 36.

A town lot is a "field" within the meaning of the statute. McMinn, 81—585.

DIVISION FENCE ON LAND OF DEFENDANT.—The removal of a fence dividing the field of defendant and the prosecutor is not indictable under this statute when the fence is altogether on the lands of defendant. Watson, 86—626.

Where there is a controversy about the dividing line between the prosecutor and defendant, and the fence removed is shown to have been around a cultivated field in the actual possession of the prosecutor, evidence that the fence was on land belonging to defendant is incompetent. Marsh, 91—632.

It is not indictable for one to remove a fence from his own land which had been unlawfully put there by another, though it partially encloses a cultivated field belonging to the other. *Headrick*, 48 (3 Jones), 375.

WHAT KIND OF FENCE IS PROTECTED.—An erection, consisting of posts nine or ten feet apart on which slats were nailed, placed by the side of a road and separating it from a field, but which did not connect with any fence or surround the field, is not such a fence as is protected from injury. *Roberts*, 103—744.

INDICTABLE, THOUGH DEFENDANT HAS BETTER TITLE.—The removal of a fence from around a cultivated field in the possession of another is indictable, though defendant may have a better title to the premises than the prosecutor. *Hovis*, 76—117.

TITLE.—Where a person has neither possession nor right of possession to land, he can not, on indictment for unlawfully removing a fence therefrom, raise a question as to the right of entry, nor is it any defence that he did the act to bring on a civil suit in order to try the title. *Graham*, 53 (8 Jones), 397.

An omission to conclude *contra forma statuti* is fatal to the indictment. *Hill*, 79—656.

INJURY TO CATTLE NOT INDICTABLE AT COMMON LAW.—The wounding of cattle maliciously is not an indictable offence at common law. *Manuel*, 72—201.

VARIANCE.—Proof of injury to an ox will not support an indictment charging injury to a cow. *Hill*, 79—656.

OWNER TURNING HIS STOCK OUT IN STOCK-LAW TERRITORY.—It is no defence to an indictment for injury to live stock that the stock law prevailed in the community, and the prosecutor turned his stock out, or permitted them to run at large through negligence, since in such cases the stock may be impounded. *Brigman*, 94—888.

DOGS.—The owner of a dog has such a property in him as will sustain an indictment for injury to property. *Latham*, 35 (13 Ired.), 33.

EVIDENCE—AGREEMENT.—Evidence offered by defendant to prove that he and the prosecutor had agreed upon the removal and had had a surveyor to locate the line, and that he moved the fence to such location in good faith, believing that he was carrying out the agreement, was improperly excluded, since if true he could not be guilty. *McCracken*, 118—1240.

REMOVING FENCE—THE OFFENCE.—To constitute the offence of removing a fence the defendant must be a trespasser, and to be a trespasser he must act wilfully and unlawfully. *McCracken*, 118—1240.

Sec. 274 (1081). Malicious injury to real property. R. C., c. 34, s. 111. 1873-'4, c. 176, s. 5.

If any person shall maliciously commit any damage, injury or spoil upon any real property whatsoever, either of a public or private nature, for which no punishment is provided by any existing law, every person so offending shall be guilty of a misdemeanor: *Provided*, that nothing herein shall extend to any case where the party trespassing or doing the injury acted under a fair and reasonable belief that he had a right to do the act complained of, nor to any trespass not being wilful and malicious, committed in hunting, fishing or the pursuit of game. When the owner or one

of the owners of an estate in possession shall complain of the injury before a justice of the peace of the county in which the offence is charged to have been committed, before the regular term of the superior court next after the commission of the offence, and shall fail to state in his complaint that the damage exceeds ten dollars, the punishment, upon conviction of the offence, shall not exceed a fine of fifty dollars or imprisonment for thirty days.

Sec. 275 (1082). Injury to personal property. 1876-'7, c. 18. 1885, c. 53.

If any person shall wantonly and wilfully injure the personal property of another, he shall be guilty of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the court.

INDICTMENT.—An indictment for injury to a dwelling-house in the possession of a lessee must lay the property in the lessee. *Mason*, 35 (13 *Ired.*), 341.

It is not necessary that the indictment should charge that the act was "unlawfully" done. *Martin*, 107—904.

An indictment for injuring a cow *concluding at common law*, which fails to charge that the offence was committed "mischievously or from malice to the owner," can not be sustained. *Hill*, 79—656.

[This is changed since the act of 1885, amending the above statute by striking out the words "through malice to the owner."]

NOTE.—A promissory note, or due bill, being an "evidence of debt" and embraced in the term "personal property" (section 3765 [6] of The Code) the wanton and wilful injury to or destruction of it is indictable. *Sneed*, 121—614.

INDICTMENT.—An indictment for killing a hog running at large in a town in violation of a town ordinance prohibiting hogs from running at large in the town, which simply charges that the killing was done "unlawfully and on purpose," can not be sustained. *Tweedy*, 115—704.

It is not necessary to allege or prove any malice toward the owner of the property injured or destroyed. *Sneed*, 121—614.

NOT NECESSARY THAT PROPERTY BE DESTROYED.—It is immaterial whether the property was actually destroyed or not. *Sneed*, 121—614.

INJURY TO STOCK.

See also STOCK LAW AND FENCES.

Sec. 276 (1002). Cattle and live stock, the wilful killing or injuring of, running at large in the range. R. C., c. 34, s. 104. 1850, c. 94, s. 2. 1885, c. 383. 1895, c. 190.

If any person shall unlawfully and on purpose drive any live stock, lawfully running at large in the range, from said range, or shall kill, maim, or injure any live stock, lawfully running at large in the range, or in the field or pasture of the owner, whether done with the actual intent to injure the owner, or to drive the stock from the range, or any other unlawful intent, every such person, his counsellors, aiders, and abettors, shall be guilty of a misdemeanor: *Provided*, that nothing herein contained shall prohibit any person from driving out of the range any stock unlawfully brought from other states or places, and in any indictment under this section it shall not be necessary to name in the bill or prove on the trial the owner of the stock maimed, killed or injured.

One who kills a hog running at large in a town in violation of an ordinance prohibiting the running at large of hogs therein, although the owner lives outside the town, is not guilty of injury to property under this section. Tweedy, 115—704.

Sec. 277 (1003). Cattle and live stock, injury to, in unlawful inclosure. 1868-'9, c. 253.

If any person shall wilfully and unlawfully kill or abuse any horse, mule, hog, sheep or other cattle, the property of another, in any inclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor, and fined or imprisoned at the discretion of the court: *Provided*, that this section shall not apply to any county or territory where the stock law prevails.

INDICTMENT.—An indictment for injury to stock in "*the field*" of the prosecutor, "the same not being surrounded by a lawful fence," is fatally defective. The word "field" has not as extensive signification as "inclosure," and therefore the terms are not equivalent. Staton, 66—640.

An indictment which alleges that defendant did kill a certain cow "in an enclosure not then and there surrounded by a lawful and sufficient fence," sufficiently describes the inclosure without stating to whom it belongs. Painter, 70—70.

An indictment which fails to allege that the killing was "wilfully and unlawfully" done is defective. Simpson, 73—269.

The omission of the word "wilfully" in an indictment for injury to stock is a fatal defect. Parker, 81—548.

INTENT SHOWN BY RECKLESSNESS.—Where defendant recklessly shoots at cattle in his corn-field to frighten and run them out, and kills the prosecu-

tor's mule, which he did not see, the corn being very high, his recklessness shows the criminal intent, and he is guilty. *Barnard*, 88—661.

INJURY BEGAN WITHIN BUT COMPLETED OUTSIDE THE FIELD.—Where defendant set his dogs on a cow in a field not surrounded by a lawful fence, and the dogs chased and worried her both within the field and outside of it, though the witness could not say whether the injury was inflicted in the field or out of it, he is not entitled to an instruction that unless the cow was injured in the field he would not be guilty, since the offence is complete if the injury is begun within the field but completed outside. *Godfrey*, 97—507.

Where the state fails to prove that the cow was shot in the field of defendant, he is entitled to a new trial. *Deal*, 92—802.

The word "cattle" embraces all quadrupeds, including "goats." *Groves*, 119—822.

Sec. 278 (2482). Cruelty to animals forbidden. 1881, c. 34, s. 1; c. 368, s. 1. 1891, c. 65.

If any person shall wilfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, or cruelly beat, or needlessly mutilate, or kill, or cause or procure to be overdriven, overloaded, wounded, injured, tortured, tormented, or deprived of necessary sustenance, or to be cruelly beaten, needlessly mutilated, or killed as aforesaid, any useful beast, fowl, or animal, every such offender shall for every such offence be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days, or both fined and imprisoned as aforesaid.

INDICTMENT.—An indictment charging defendant with "shooting" a cow is sufficient, since the word shooting, though not used in the statute, is equivalent to wounding. *Butts*, 92—784.

An indictment for cruelty to animals which simply charges that defendant did "torture, torment and act in a cruel manner towards a certain animal" is fatally defective for failure to set out the facts constituting such cruel conduct. Approving *State v. Allison*, 90—733, and *State v. Butts*, 92—784. *Watkins*, 101—702.

EVIDENCE.—Evidence that the cow killed by defendant entered defendant's field over a part of a cross fence which it was the prosecutor's duty to keep up, and that defendant killed the cow to prevent her from injuring his crops, is inadmissible. *Butts*, 92—784.

Where the prosecuting witness, on indictment against defendant for killing a hog, is asked by defendant if he did not say to a certain person that "rather than be outdone by a negro he would swear to any amount of lies," and such statement is denied, he can not be contradicted by proof that he did make such statement, since it is entirely collateral. *Roberts*, 81—605.

POLICEMAN.—Defendant, a policeman, in an attempt to stop a runaway horse in the streets of a town, struck it with a large stone and caused it to fall: *Held*, that it was error to instruct the jury that defendant was guilty, it being the province of the jury to determine whether the presumption that the policeman acted in good faith in the discharge of his duty was overcome by proof of a wilful purpose to injure the horse. *Isley*, 119—862.

TORTURE NOT NECESSARY.—The needless killing of chickens is of itself cruelty within the meaning of the statute, though done without torture. Neal, 120—613.

The statute does not require the allegation or proof of torture or cruelty, except as involved in unnecessary suffering knowingly and wilfully permitted. Porter, 112—887.

KILLING TO PREVENT DESTRUCTION OF CROP.—Where the killing was wilful the fact that chickens killed by a defendant were killed while destroying peas in the garden of defendant's father, and after the prosecutor had been warned to keep the chickens from trespassing in the garden, is not a defence to an indictment for cruelty to animals. Neal, 120—613.

CHICKENS—IMPOUNDING.—Chickens could be impounded at common law. Neal, 120—613.

INDICTMENT.—An indictment for killing a hog running at large in a town in violation of an ordinance prohibiting the running at large of hogs therein, which simply charges that the killing was done "unlawfully and on purpose," can not be sustained. Tweedy, 115—704.

An averment that defendant did "knowingly, wilfully and needlessly act in a cruel manner towards a certain fowl, to-wit: a chicken, by killing said chicken, the said chicken being a useful fowl," is a sufficiently intelligible charge that the defendant was guilty of cruelty to animals. Neal, 120—613.

BURDEN NOT ON DEFENDANT.—An instruction that it was incumbent on the defendant to justify the killing of the chickens was erroneous. Neal, 120—613.

INDICTMENT SUSTAINED.—A charge of cruelty to animals is sustained by proof of impaling one chicken on a sharp stick and beating a hen to death. Neal, 120—613.

PIGEONS USED AS TARGETS.—Killing or wounding pigeons used as targets, for amusement and sport, is indictable under this section. Porter, 112—887.

Sec. 279 (2483). Bear-baiting, etc., prohibited. 1881, c. 368, s. 2. 1891, c. 65.

Any person who shall keep, or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting, or baiting any bull, bear, dog, cock, or other animal; and any person who shall encourage, aid or assist therein, or who shall permit or suffer any place to be so kept or used, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days, or both fined and imprisoned as aforesaid.

Sec. 280 (2484). Failure to provide impounded animals with food, a misdemeanor. 1881, c. 368, s. 3. 1891, c. 65.

Any person who shall impound, or cause to be impounded in any pound or other place, any animal, shall supply to the same during such confinement a sufficient quantity of good and wholesome food and water, and in default thereof shall be guilty of a

misdeemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days, or both fined and imprisoned as aforesaid.

Sec. 281 (2486). *Misdemeanor to carry in conveyance any animal in a cruel manner.* 1881, c. 368, s. 5. 1891, c. 65.

If any person shall carry or cause to be carried in or upon any vehicle, or other conveyance, any animal in a cruel or inhuman manner, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days; whenever he shall be taken into custody therefor by any officer, such officer may take charge of such vehicle or other conveyance and its contents, and deposit the same in some safe place of custody; and the necessary expenses which may be incurred for taking charge of and keeping and sustaining the same shall be a lien thereon, to be paid before the same can be lawfully reclaimed; or the said expenses, or any part thereof remaining unpaid, may be recovered by the person incurring the same of the owner of said animal in an action therefor.

Sec. 282 (2487). *Misdemeanor to instigate or engage in any act of cruelty to animals.* 1881, c. 368, s. 6. 1891, c. 65.

Any person who shall wilfully set on foot, or instigate, or move to carry on, or promote, or engage in, or do any act towards the furtherance of any act of cruelty to any animal, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days, or both fined and imprisoned as aforesaid.

Sec. 283 (2488). *The sale of animals having glanders forbidden.* 1881, c. 368, s. 7. 1891, c. 65.

Any person who shall sell, or offer for sale, or who shall use, or expose, or cause or procure to be sold or offered for sale, or to be used or exposed, any horse or other animal having the disease known as glanders or farcy, or any other contagious or infectious disease known by such person to be dangerous to life, or which shall be diseased past recovery, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days, or both fined and imprisoned as aforesaid.

Sec. 284 (2489). *Animals with glanders to be killed.* 1881, c. 368, s. 8. 1891, c. 65.

Every animal having the glanders or farcy shall at once be deprived of life by the owner or person having charge thereof upon

discovery or knowledge of its condition, and any such owner or person omitting or refusing to comply with this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days, or both fined and imprisoned as aforesaid.

Sec. 285 (2490). Construction of certain words. 1881, c. 368, s. 15.

In this chapter, and in every law which may be enacted, relating to animals, the words animal or dumb animal shall be held to include every living creature; the words torture, torment or cruelty shall be held to include every act, omission or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted; but nothing in this chapter shall be construed as prohibiting the lawful shooting of birds, deer and other game for the purpose of human food.

Sec. 286 (2321). When driven from one part of the state through another, must be certified to be healthy, etc.; misdemeanor for justice to grant certificate without affidavit. R. C., c. 17, s. 5.

No person shall drive any cattle from any part of the state through any other part thereof, without first obtaining and carrying with him a certificate under the hands and seals of two justices of the peace of the county where such cattle were severally purchased or collected from the range, accompanied with an affidavit of the owner setting forth the place where said cattle were purchased, or had ranged as aforesaid, and describing therein the nature of the soil and growth of timber on such place; and also that said cattle were, at the time of purchase or removal, sound and free from any infectious distemper. And if any justice shall grant such certificate without such affidavit of the owner, it shall be a misdemeanor in office.

Sec. 287 (2322). Persons allowing distempered cattle to go at large to be guilty of misdemeanor, etc. 1868-'9, c. 50, s. 1.

If any person shall drive or cause to be driven any cattle from any county in this state, or from any county or district in any other state into any county in this state, at any time between the first day of April and the first day of November, knowing such cattle to be distempered or otherwise infected, or shall permit any distempered cattle to roam at large and enter any uninfected, district, he shall be guilty of a misdemeanor, and be liable to an action for all damages which may arise from a violaton of this section.

Sec. 288 (2323). When subject to damage only. 1368-'9, c. 50, s. 2.

If any person shall drive or cause to be driven any cattle as aforesaid, not knowing them to be infected, and losses should be sustained by the spreading of distempers or infection from said cattle, he shall be subject to damages only.

Sec. 289 (2324). When not subject to penalty. 1868-'9, c. 50, s. 3.

If any person complies with the requirements of section twenty-three hundred and twenty-one, without regard to growth or locality, said person shall not be subject to the above penalties.

Sec. 290 (1001). Cattle and live stock, mismarking, a misdemeanor. R. C., c. 34. 1797, c. 485, s. 2.

If any person shall knowingly alter or deface the mark or brand of any other person's horse, mule, or ass, neat cattle, sheep, goat, or hog, or shall knowingly mismark or brand any such beast that may be unbranded or unmarked, not properly his own, with intent to defraud any other person, the person so offending shall be guilty of a misdemeanor, and punished as if convicted of larceny.

INDICTMENT—ORIGINAL MARK.—An indictment for altering the mark of a cattle-beast need not set forth the original mark nor in what manner the alteration was made. O'Neal, 29 (7 Ired.), 251.

PAROL EVIDENCE OF MARK.—Parol evidence is competent to prove the mark of the prosecutor. King, 84—737.

Where the act is proved to have been wilfully done the intent to injure or defraud the owner necessarily follows unless there be proof to the contrary. Davis, 24 (2 Ired.), 153.

The fact that the cattle had strayed from the owner at the time the injury was done is no defence. Davis, 24 (2 Ired.), 153.

Sec. 291 (2822). Definition of word "stock."

The word "stock" in this chapter shall be construed to mean horses, mules, colts, cows, calves, sheep, goats, jennets, and all neat cattle and swine.

INSANITY.

Where insanity is relied on as a defence the burden is on the defendant to establish it to the satisfaction of the jury. Potts, 100—457.

While the law recognizes *delirium tremens* as a species of insanity, "dipsomania" and "moral insanity" are not recognized as defences. Potts, 100—457. McDaniel, 115—807.

Where hereditary insanity is offered as an excuse for crime it must appear that the kind of insanity proposed to be proven as existing in the prisoner is no temporary malady, but that it is notorious, and of the same species with which other members of the family have been afflicted. Christmas, 51 (6 Jones), 471.

Where, upon his arraignment, it is suggested that a prisoner is insane, and not capable of conducting his defence, the proper manner of procedure is to submit an issue to the jury, in order to ascertain this fact, and while there are precedents for submitting the issue as to guilt at the same time, the practice is disapproved. Haywood, 94—847.

Voluntary drunkenness is no excuse for the commission of crime. Keath, 83—626.

If a prisoner after conviction of a capital felony suggests insanity, the judgment must be suspended until the fact can be tried by a jury; if after judgment execution must be likewise stayed. Vann, 84—722.

The prisoner having been found insane the court ordered that he be confined in the asylum until his mind be restored, "upon the happening of which event the authorities of said asylum are hereby ordered to notify the clerk of the superior court for the county of Granville to the end that he may be returned to said county for trial." The prisoner afterwards escaped from the asylum, but was retaken, put on trial and convicted: *Held*, that an objection that the prisoner could not be required to plead until the asylum authorities had certified that he had recovered his sanity could not be sustained, since the court's authority to inquire into his mental condition and try him, if found sane, did not depend on the action of the asylum authorities. Pritchett, 106—667.

A motion for a new trial on the ground that one of the jurors became insane shortly after the rendition of the verdict, and might be supposed to have been insane while on the jury, may be denied in the discretion of the court, in the absence of any evidence that the juror was insane while acting as a juror. Rogers, 94—860.

The insanity which takes away the criminal quality of an act must be such as amounts to a *mental disease*, and prevent the accused from knowing the nature and quality of the act he is doing. Brandon, 53 (8 Jones), 463.

If the prisoner at the time of the commission of the act was in a state of mind to comprehend his relations to other persons, the nature of the act and its criminal character, or in other words, if he was conscious of doing wrong at the time he committed the deed, then he is guilty; but if he was under the visitation of God, and could not distinguish between good and evil and did not know what he did, he is not guilty of any offence. Haywood, 61 (Phil.), 376.

Where, on indictment for bigamy, want of mental capacity at the time of the second marriage is relied on as a defence, the burden is on the defendant to satisfy the jury, but not beyond a reasonable doubt, that he had not sufficient mental capacity to know right from wrong. Davis, 109—780.

On indictment for murder, defendant pleaded: "I admit the killing, but was insane at the commission thereof, therefore not guilty." The court rejected all of the plea except "not guilty." *Held*, no error, since under the plea of not guilty every defence to the charge embraced in the rejected part of the plea was admissible. Potts, 100—457.

If hereditary insanity is offered as an excuse for crime it must be shown that the kind of insanity proposed to be proven as existing in the defendant is no temporary malady; but that it is notorious, and of the same species with which other members of the family have been afflicted. Christmas, 51 (6 Jones), 471.

Where there is no evidence that a defendant had ever exhibited any sign of insanity, evidence tending to show that some of his uncles and aunts were insane is inadmissible. *Cunningham*, 72—469.

A defendant's own declarations just after the act are not competent to prove his insanity. *Scott*, 8 (1 Hawks), 24.

While the testimony as to mental capacity falls within the exception to the rule that no witness, other than qualified experts, shall be allowed to express an opinion in a matter submitted to the inquiry of a jury, yet insanity can not be proved by general reputation or hearsay. *Coley*, 114—879.

INSURANCE AGENT.

Sec. 292 (3077). Insurance agent guilty of felony, when. 1883, c. 57, s. 17.

Any insurance agent doing business in this state, who shall unlawfully withhold or expend the funds of his principal, shall, upon conviction thereof, be guilty of felony.

INTENT.

When an act itself is equivocal, and becomes criminal only by reason of the intent with which it is done, both must unite to constitute the offence, and both must be proved to warrant a conviction. *Smith*, 93—516.

Intent is defined to be a steadfast resolve and deeprooted purpose, or a design formed after carefully considering the consequences. *Thomas*, 118—1113.

Where an act is forbidden by statute the doing of it constitutes the offence, and the intent with which it was done is immaterial. *Railway*, 122—1052.

An intent to commit a felonious act, where the intent is only a misdemeanor, merges in the felony, if the act be committed; but not if the intent alone is a felony of the same grade with the act itself; and the defendant may be convicted of either upon evidence of the particular offence charged. *Jesse*, 20 (3 D. & B.), 98.

INTIMIDATION OF VOTERS.

Sec. 293 (2715). Intimidation of voters. 1868, c. 62, s. 4.

Any person who shall discharge from employment, withdraw patronage from, or otherwise injure, threaten, oppress, or attempt

to intimidate any qualified voter of this state, because of the vote such voter may, or may not have cast in any election, shall be guilty of a misdemeanor.

Sec. 294 (2716). Bribery at elections. R. C., c. 52, s. 22. 1868, c. 62, ss. 1, 3. 1868-'9, c. 176, s. 1. 1876-'7, c. 275, s. 45.

Any person who shall, at any time before or after an election, either directly or indirectly, give, or promise to give, any money, property, or reward to any elector, or to any county or district, in order to be elected, or to procure any other person to be elected a member of the general assembly, or to any office under the laws of this state, shall forfeit and pay four hundred dollars to any person who will sue for the same, and shall be guilty of a misdemeanor; and any person who shall receive or agree to receive any such bribe shall also be guilty of a misdemeanor.

INTOXICATING LIQUORS.

See LIQUOR SELLING—LOCAL OPTION.

JEOPARDY.

See FORMER JEOPARDY.

JUDGE'S CHARGE.

Sec. 295 (413). Judge to explain law, but to express no opinion on facts. C. C. P., s. 237. R. C., c. 31, s. 130. 1796, c. 452, s. 1.

No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon.

REFUSAL TO CHARGE THAT THE EVIDENCE IS NOT SUFFICIENT.—Where the evidence is not sufficient to prove the offence charged in the indictment, the refusal of the judge to so instruct the jury is good ground for exception. Massey, 86—658.

OPINION MUST BE PREJUDICIAL.—The statute only prohibits the trial judge from expressing an opinion upon those facts respecting which the parties take issue or dispute, and, in order to constitute a violation of the statute, remarks complained of must be shown to have been an expression of opinion on the facts and prejudicial to the party complaining of the same. Robertson, 121—551.

COLLATERAL EVIDENCE.—The trial judge is not required to repeat to the jury collateral evidence. Caveness, 78—484.

COMPLIANCE WITH STATUTE.—The court is not required to give instructions in the very words asked even when unobjectionable. A substantial compliance is sufficient. Booker, 123—713.

PROPER EXPRESSION.—A proper expression in charging the jury is, "if you find from the evidence," instead of "if you believe such a fact or facts." Barrett, 123—753.

STATING THE EVIDENCE AND DECLARING LAW.—A failure to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon," is not error when the court is not requested to do so, especially when the evidence is neither complicated or peculiar in its bearings, and when the court expressly directs attention to the evidence in defendant's behalf. Distinguishing *State v. Boyle*, 104 N. C., 800. Pritchett, 106—667.

DECLARATIONS OF ONE PRISONER AGAINST ANOTHER.—A general charge that the jury should not consider any admission or declaration of one prisoner against the others on trial, unless they were present when made, is not a sufficient compliance with the law, which excludes evidence of the declarations of one of the prisoners as against the others unless they were made in the presence of the others. Oxendine, 107—783.

JURY NOT THE JUDGES OF THE LAW.—It is not error to refuse to tell the jury that they are the judges of the law as well as of the facts. Peace, 46 (1 Jones), 251.

GOOD CHARACTER IN PLAIN CASE.—It is error to charge the jury that "in a plain case a good character would not help the prisoner, but in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf;" the true rule being that in all cases a good character is to be considered. Henry, 50 (5 Jones), 65.

MAJORITY OF JURY YIELDING TO ONE.—It is not error for the court to refuse to charge that in case one of the jury had a doubt as to the guilt of the prisoner, the other jurors should yield to him. Bowman, 80—432.

CAUTION BEFORE ADJOURNMENT.—A failure of the judge to instruct the jury before a short adjournment pending the trial of a capital case that they should not discuss the case among themselves or with third parties during the recess, is not sufficient cause for a new trial where it does not appear that an improper verdict resulted from such omission, or that the jury were tampered with. Edwards, 79—648.

JURY NOT BOUND TO BELIEVE UNIMPEACHED WITNESS.—It is error to charge the jury they are bound to believe a witness unless he is impeached. Smallwood, 75—104.

TESTIMONY OF RELATIONS REGARDED WITH SUSPICION.—It is not error to instruct the jury that the law regards with suspicion the testimony of near relations when testifying for each other. Nash, 30 (8 Ired.), 35.

The testimony of a witness related to the party for whom he testifies is thereby affected, and his evidence must be received with some degree of allowance. Boon, 82—637.

CASE RELIED ON BY DEFENCE.—A charge that a certain case relied on by the defence was the law in North Carolina, "*but it was the extreme verge of the law,*" is no ground for a new trial. Harrison, 69—264.

SINGLING OUT WITNESS.—While the court may not single out a witness or witnesses and charge the jury that they must find in a designated way if they believe such witnesses: yet, if the opposite state of facts and the law applicable thereto have been called to the attention of the jury, it may properly tell the jury that if they believe a certain state of facts as deposed to by certain witnesses, then the law applicable is so and so, for thus the attention of the jury is directed not to the credibility of the witnesses, but to a certain state of facts or hypothesis. Rollins, 113—722.

UNPREJUDICIAL INSTRUCTION.—The defendants can not complain of an erroneous instruction which was not prejudicial to them, but in their favor. Freeman, 122—1013.

NO EXPRESSION OF OPINION.—A charge that perjury is very much a matter of intent, and that as to that the jury must be satisfied beyond a reasonable doubt upon "all the facts and circumstances of the case deposed to by the witnesses" contains no expression of opinion by the judge. Journigan, 120—568.

Where, on the trial of an indictment for seduction, the prosecutrix in reply to a question tearfully and energetically denied that she ever had carnal intercourse with any one but the defendant, and the crowd of bystanders laughed boisterously, and thereupon the trial judge, in attempting to quell the disturbance, remarked, "If I could discover the infernal fiends who laugh in such a manner, I would send them to jail for contempt," such remarks are not an expression of opinion on the facts involved in the prosecution. Robertson, 121—551.

READING NOTES WAIVED—EFFECT.—The consent of the defendant that the judge need not read over his notes of the testimony is not a waiver of his right to have the law applied to the facts in the case as the law requires. Groves, 121—563.

PRAYER CORRECT ONLY IN PART.—Where an instruction prayed for is correct in part and incorrect as an entirety, the court is not called upon to dissect it and give so much of it as is good. Neal, 120—613.

DEFENDANT GUILTY ON OWN EVIDENCE.—When justified by the evidence the judge may charge the jury that if they believe the testimony of the defendant who testifies in his own behalf, they should find him guilty. Woolard, 119—779.

GENERAL PRINCIPLES MUST BE STATED.—The rule that in the absence of a request no exception can be maintained for a failure to charge on any particular phase of the case does not exclude the duty of the court to instruct the jury as to the nature of the offence and the general principles of law essential to their verdict. Fulford, 124—.

EXCEPTION, WHEN MADE.—An exception for omission to charge must be made before verdict. Harris, 120—577.

CONSENT TO VERDICT OF MANSLAUGHTER OF ONE PRISONER—OPINION.—Where two are on trial for murder, the fact that the court permits the solicitor to consent to a verdict of manslaughter as to one, is no expression as to the grade of the other's offence. Pratt, 88—639.

HARMLESS REMARK.—Where the judge in charging the jury remarks that the prisoner is charged with a "dastardly crime," but it does not appear that the remark was made in a spirit or tone unfriendly or hostile

to the prisoner, nor that it tended to prejudice him before the jury, an exception to the remark can not be sustained. *McCarter*, 98—637.

JURY NOT BOUND TO BELIEVE UNCONTRADICTED WITNESS.—It is error for the court in referring to a witness to charge that "If her character is of ordinary respectability, you will take her testimony to be true, unless she is fully and thoroughly contradicted." *Parker*, 66—624.

INSTRUCTION NEED NOT BE IN VERY WORDS ASKED.—The trial judge is not required to give a prayer for instructions in the very words in which it is asked, nor to give impertinent instructions, nor to recite the testimony of each witness in the order in which he was examined. *Jones*, 97—469.

GIVING PROMINENCE TO TESTIMONY OF ONE WITNESS.—Where the evidence is conflicting, it is erroneous to separate and give prominence to the testimony of one witness, who is in conflict with others, but if the conflicting statements are put side by side, and the jury directed, as they might find the facts to be, to convict if they found the facts as testified by one witness, but to acquit if they should find the contrary, but that all the evidence should be considered, and if not satisfied appellant fought *willingly* they should acquit, there is no error. *Weathers*, 98—685.

PREJUDICIAL REMARK CONCERNING DEFENDANT'S COUNSEL.—On disagreement of counsel as to the testimony of a witness, the court stated that both the counsel were wrong, but that he would so recapitulate the testimony that "It would be moral perjury for a juror to accept the statement of defendant's counsel:" *Held*, that such remark was an invasion of the province of the jury, and entitled the defendant to a new trial. *Sykes*, 80—618.

CHARGING ABSTRACT PROPOSITION OF LAW.—A charge in which the court deals in generalities and abstract propositions of law, merely reading "head notes" of reported cases, without making any application of them to the facts of the case, does not meet the requirements of the statute. *Jones*, 87—547.

EXPRESSION OF OPINION AS TO CREDIT OF WITNESS.—An instruction that from the testimony of the prosecutor, and from the nature of his testimony, otherwise it was not possible for him to be in error, is erroneous, since it takes from the jury the degree of credit to be given his testimony. *Presley*, 35 (13 Ired.), 494.

CHARGE MUST BE COMPLETE.—On the trial of defendant for perjury it appeared that on a former trial for forcible entry, defendant, who was then the prosecutor, swore that he was present and forbade the trespass. The evidence was that some of the trespassers had entered before defendant reached the place, that others were in the act of entering, and that he was fifty or seventy-five yards distant when he forbade them, and that they persisted notwithstanding his forbidding: *Held*, that the fact that defendant was not on the very spot when he forbade the entry, and that the trespass had been commenced but not completed before the forbidding, were immaterial, and that a charge that defendant's guilt depended on the fact of his presence, without further instructions was not a compliance with the statute. *Lawson*, 98—759.

EXPRESSION OF OPINION.—A remark of the judge, made before the trial began, that the jailer had said that the prisoner "would escape if he had the opportunity," is not an expression of opinion. *Jacobs*, 106—695.

TESTIMONY OF A DEFENDANT AFTER SEVERANCE.—Where there is a severance on the trial of defendants, and another party charged in the bill testifies in behalf of the accused, it is error, as indicating an opinion on the facts, to charge that the very fact that the witness is included in the same indictment will impair his testimony, and that his testimony should not

be placed on the same plane or footing with that of a witness of undoubted character who is disinterested. Jenkins, 85—544.

REMARK AS TO WEIGHT OF INCOMPETENT EVIDENCE.—An erroneous remark of a judge upon the weight of evidence that ought not to have been admitted at all, is not ground for disturbing a verdict. Neville, 51 (6 Jones), 423.

EMPHASIS EQUIVALENT TO DENIAL THAT THERE IS EVIDENCE.—Where the judge in his charge asks with emphasis, and in an animated tone, *Where is the evidence to establish a particular fact?* it will be taken that he meant to deny that there was any such evidence. Simmons, 51 (6 Jones), 21.

Sec. 296 (414). Judge to put his instructions in writing. C. C. P., s. 238.

Every judge at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, shall put his instruction in writing, and read them to the jury; he shall then sign and file them with the clerk as a part of the record.

At the request of counsel, made in apt time, the court must put its entire charge in writing, and it is error to charge them orally upon any point even when they return into court for further instructions. Young, 111—715.

After the judge has handed his written instructions to the jury, he may, upon request of the jury after they have retired, send a written memorandum of certain dates necessary to be remembered in order to enable them to reach a conclusion. Cagle, 114—835.

The rule that the charge shall be in writing when requested does not forbid any and all oral expressions from the judge. Hence, where, by an expression to the jury, the defendant got the benefit of a prayer for instructions, he can not complain that it was not put in writing. Crowell, 116—1052.

Sec. 297 (415). Counsel to put their prayers for instruction in writing. C. C. P., s. 239.

Counsel praying of the judge instructions to the jury, shall put their requests in writing entitled of the cause, and sign them; otherwise the judge may disregard them; they shall be filed with the clerk as a part of the record.

Sec. 298. Judge's charge, jury to take. 1885, c. 137.

Whenever a judge shall put his instructions to the jury in writing either of his own will or at the request of any party to an action on trial, he shall, at the request of either party to the action, allow the jury to take his instructions with them on their retirement, and the jury shall return said instructions with their verdict to the court.

JURISDICTION.

JUSTICES OF THE PEACE.

Sec. 299 (892). Criminal jurisdiction of justices of the peace. Const., Art. IV, s. 27. 1879, c. 92, ss. 2, 11. 1881, c. 210. 1891, c. 152. 1889, c. 504.

Justices of the peace shall have exclusive original jurisdiction of all assaults and batteries, and affrays, where no serious damage is done, and of all criminal matters arising within their counties, where the punishment prescribed by law shall not exceed a fine of fifty dollars, or imprisonment for thirty days: *Provided*, that justices of the peace shall have no jurisdiction over assaults with intent to kill, or assaults with intent to commit rape, except as committing magistrates: *Provided, further*, that nothing in this section shall prevent the superior, inferior or criminal courts from finally hearing and determining such affrays as shall be committed within one mile of the place where and during the time such court is being held; nor shall this section be construed to prevent said courts from assuming jurisdiction of all offences whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace within twelve months after the commission of the offence, shall not have proceeded to take official cognizance of the same.

POWERS OF MAGISTRATES.—A justice of the peace can only exercise such powers as are conferred upon him by the constitution, art. 4, sec. 27, and the statutes in harmony therewith. His jurisdiction is special, not general, and his authority is not to be enlarged by principles of law applicable to courts of general jurisdiction; nor can he adopt methods of procedure not strictly allowed by law. Jones, 100—438.

BURDEN AS TO TIME.—Where a justice has original jurisdiction the burden is on defendant to show that twelve months have not elapsed. Carpenter, 111—706.

JUSTICE HAS CONCURRENT JURISDICTION AFTER TWELVE MONTHS.—A justice of the peace, after the expiration of the twelve months, has concurrent jurisdiction with the superior court of offences of which he has exclusive original jurisdiction. Roberts, 98—756.

AMENDMENT OF 1891 VOID.—The act of 1891, which amended the above section by striking out in line 3 between the word "where" and the word "no" the words "no deadly weapon is used and," leaving section 31 (The Code, sec. 987), which still prescribes that assaults with a deadly weapon may be punished by fine or imprisonment *in the discretion of the court*, unamended, does not confer jurisdiction on justices of the peace in cases where a deadly weapon was used but no serious damage was inflicted. Though the statute now in terms confers jurisdiction on justices of the peace, the punishment being still prescribed by section 31, the amendment is inoperative and of no effect. Fesperman, 108—770.

JAILER WHIPPING PRISONER WITH BUGGY WHIP.—An indictment charged that defendant made an assault upon the prosecutrix with a "deadly wea-

pon, to-wit, a club," and on the trial it appeared that the defendant was the keeper of the jail and resided therein with his family; that his wife was seriously ill; that prosecutrix was imprisoned in the jail and was conducting herself in a loud, boisterous and disorderly manner, and refused to desist when ordered by defendant; that thereupon he took her to another apartment and gave her a severe whipping with a buggy whip, cutting the flesh on her back and arms, but she was not disabled and the places healed up in a week or two: *Held*, that the superior court had jurisdiction. Roseman, 108—765.

SUFFICIENT TO CHARGE ASSAULT WITH DEADLY WEAPON.—Where the indictment charges an assault with a deadly weapon the superior court has jurisdiction, though it is shown that the offence was only a simple assault, and was committed within less than twelve months from the finding of the bill. Feserman, 108—770.

DEFENDANT MUST PROVE OFFENCE COMMITTED WITHIN SIX MONTHS.—Where the indictment charges an assault with a deadly weapon without stating the character of the weapon used, and it does not appear that the offence was committed within six months from the finding of the bill, the indictment will be sustained for a simple assault and battery, and the superior court retains jurisdiction. Russell, 91—624.

INDICTMENT MUST NAME THE WEAPON AND GIVE ITS CHARACTER.—Where the indictment alleges that the offence was committed with a deadly weapon, but fails to name the weapon or set forth its character, or where the bill alleges that serious damage was done, but fails to set forth the nature and extent of the injury, the superior court has no jurisdiction until after six months from the commission of the offence. Cunningham, 94—824.

SUBMISSION FOR SIMPLE ASSAULT ON INDICTMENT FOR RAPE.—Where the indictment charges an assault with intent to commit rape, and defendant submits for a simple assault, the superior court, having obtained jurisdiction, may proceed to judgment. Johnson, 94—863.

INDICTMENT FOR SIMPLE ASSAULT BEFORE SIX MONTHS ELAPSE.—Where the indictment is for a simple assault, and it appears that the offence was committed within six months next before the finding of the bill, the superior court has no jurisdiction. Berry, 83—603.

DEFENDANT BOUND WHEN JUSTICE HAD JURISDICTION.—A warrant was issued by a justice for an offence of which he had exclusive jurisdiction, but the record showed that defendant waived a trial and was bound for his appearance at the next term of the superior court, and the record of the superior court shows that "upon the foregoing warrant *and appeal* the case came on to be tried:" *Held*, that there having been no trial before the justice, the superior court did not acquire jurisdiction, and the judgment must be arrested. Lachman, 98—763.

INDICTMENT WITHIN SIX MONTHS ALLEGING DEADLY WEAPON.—Where the indictment charges an assault "with a certain deadly weapon, to-wit, a chair, knife and pistol," the superior court has jurisdiction, though it appears that no deadly weapon was used, no serious damage done, and that the prosecution was begun less than six months since the commission of the offence. Ray, 89—587.

VERDICT OF GUILTY ON SECOND COUNT CHARGING ASSAULT AND BATTERY.—Where the indictment contains two counts, one charging an assault with a deadly weapon and the other an assault and battery, and the verdict is "not guilty" on the first count but "guilty" on the second, the inferior court having once acquired jurisdiction, may proceed to judgment. Speller, 91—526.

INDICTMENT MUST STATE NATURE AND EXTENT OF INJURY.—Where the indictment simply charges that the prosecutor was "seriously injured,"

or that "serious damage" was done, without setting out the nature or extent of the injury, and the evidence shows that the offence was committed within six months, and that "an indecent assault" was made on the person of the prosecutrix, the court should direct a verdict of not guilty. *Earnest*, 58—740.

SERIOUS DAMAGE.—Defendant assaulted the prosecutor with his fist, knocked him down, jumped on him and beat him in a cruel manner, stunning him and badly injuring his eyes, but the injuries were not permanent: *Held*, that there was serious damage, and a justice had no jurisdiction. *Shelly*, 98—673.

BURDEN ON DEFENDANT TO SHOW THAT SIX MONTHS HAD NOT ELAPSED.—If the offence has been committed within six months from the finding of the bill, the burden is on the defendant to show it, but the bill must allege that the assault was made with a deadly weapon and describe it, or that serious damage was done, and set out its extent and nature. *Shelly*, 98—673.

INDICTMENT MUST SHOW CHARACTER OF WEAPON.—Where the indictment charges an assault and battery "with a deadly weapon, to-wit, a certain stick," but fails to give the dimensions of the stick, or state the damage done, and it appears that the offence was committed within less than six months before the finding of the bill, the superior court does not have jurisdiction. *Porter*, 101—713.

AFFRAYS COMMITTED WITHIN ONE MILE OF COURT-HOUSE.—Under this statute the superior courts have only concurrent jurisdiction with justices of the peace of affrays committed within one mile of the place where court is being held. *Bowers*, 94—910.

CRIME COMMITTED IN ANOTHER STATE.—The legislature of this state can not define and punish crimes committed in another state. *Knight*, 4 (*Taylor's Rep.*), 44.

TOWN ORDINANCE—JUSTICE OF THE PEACE.—A justice of the peace has jurisdiction to try misdemeanors arising from violations of town ordinances. *Distinguishing State v. Threadgill*, 76 N. C., 17; *State v. White*, 76 N. C., 15. *Wood*, 94—855.

JUSTICE HAS CONCURRENT JURISDICTION WITH MAYOR.—A justice of the peace has concurrent jurisdiction with the mayor of a violation of a town ordinance, where the punishment can not exceed a fine of \$50 or imprisonment for thirty days. *Cainan*, 94—880.

QUESTION OF JURISDICTION RAISED AT ANY TIME.—The point that the court has not jurisdiction may be made at any time by mere suggestion, or by motion to quash, or the court, *ex mero motu*, may take notice of it. *Miller*, 100—543.

CAN NOT BE CONFERRED BY CONSENT.—Neither consent nor waiver can confer jurisdiction, and the court will not proceed when it appears from the record that it has no authority. *Miller*, 100—543.

FAILURE TO LIST FOR TAXES.—Justices of the peace have exclusive jurisdiction of a misdemeanor, under Laws 1887, c. 155, and 1879, c. 92, for failure to list for taxes, and where the indictment is first found in the superior court the court may, on plea, or *ex mero motu*, stop the proceeding at any stage, even after plea of "not guilty" entered. *Benthall*, 82—664.

OFFENCES UNDER LOCAL OPTION LAW.—The superior, criminal and inferior courts have jurisdiction of offences under the local option act. *Cooper*, 101—684.

RETAILING WITHOUT LICENSE.—The superior court has jurisdiction of the offences of retailing liquors without license. *Deaton*, 101—728.

Sec. 300 (893). Additional jurisdiction, peace warrants, bastardy, etc. 1879, c. 92, s. 2.

Justices of the peace shall also have exclusive original jurisdiction of all such peace warrants and proceedings thereunder as they shall assume jurisdiction of, and of all bastardy proceedings and issues arising thereunder, and to take bonds from defendants in such proceedings, as provided for in the chapter entitled "Bastardy."

Sec. 301 (896). When justice has not final jurisdiction, must commit accused to prison, or require recognizance for his appearance to the next term of the court having jurisdiction. 1868-'9, c. 178, sub chap. 4, s. 7 1879, c. 302, s. 2.

In all cases where a justice of the peace shall not have final jurisdiction of the offence, he shall desist from any final determination of the action or complaint, and either commit the accused to prison, or require from him a recognizance with sufficient sureties and in a sufficient amount for his appearance at the next term of any court of his county having jurisdiction, to answer the charge. He shall also bind the complainant and the witnesses over to appear in like manner and testify, and he shall return the papers, with a statement of his proceedings, to the clerk of the court on or before the first day of the next term thereof.

Sec. 302 (897). When justice is satisfied that he has jurisdiction, he shall proceed to determine the case. 1868-'9, c. 178, sub chap. 4, s. 8.

When the justice shall be satisfied that he has jurisdiction, if no jury shall be asked for, he shall proceed to determine the case, and shall either acquit the accused or find him guilty, and sentence him to such punishment as the case may require, not to exceed in any case a fine of fifty dollars, or imprisonment in the county jail for thirty days.

SUPERIOR COURT.

Sec. 303 (922). Original jurisdiction of superior court. Const., Art. IV, ss. 12, 27. 1866-'7, c. 251. 1879, c. 92, s. 11. 1881, c. 210.

The superior court shall have original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offences whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within six months after the commission of the offence proceed to take official cognizance thereof.

PUNISHMENT ON CONVICTION FOR SIMPLE ASSAULT WHEN NO BODILY INJURY RESULTS.—Where, on indictment for assault with intent to commit rape, the conviction is for a simple assault, and there is no evidence that the prosecutrix suffered any bodily pain, the punishment can not exceed a fine of \$50 or imprisonment for thirty days. Nash, 109—.

PRESENTMENT WHILE JUSTICE HAS EXCLUSIVE COGNIZANCE VOID.—Where a presentment for disturbing a school is made in the superior court within six months from the commission of the offence, but the indictment is found after the expiration of six months, the superior court has jurisdiction to try the offence, since the presentment, having been made while the offence was exclusively cognizable in a justice's court, is void, and can not affect the validity of the prosecution subsequently instituted. Cooper, 104—891.

TOWN ORDINANCE.—The superior court has no jurisdiction of an indictment for violation of a town ordinance which affixes a penalty of ten dollars or ten days' imprisonment. Threadgill, 76—17.

INFERIOR COURT.

Sec. 304 (808). Jurisdiction of inferior court. 1876-'7, c. 154, s. 7. 1879, c. 92, s. 11. 1881, c. 210.

Said inferior courts shall have jurisdiction to enquire of, try, hear and determine all crimes and misdemeanors, except those whereof exclusive original jurisdiction is given to courts of justices of the peace, and except the crimes of murder, manslaughter, arson, rape, assault with intent to commit rape, burglary, horse-stealing, libel, perjury, forgery and highway robbery. Said inferior courts shall also have jurisdiction of all such affrays as shall be committed within one mile of the place where and during the time such courts are being held, and of all offences whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not, within six months after the commission of the offence, proceed to take official cognizance thereof.

JURORS.

Sec. 305 (1722). Jurors shall be selected. 1868, c. 9, s. 2. 1889, c. 559. 1897, c. 117. 1899, c. 729.

The board of county commissioners for the several counties at their regular meeting on the first Monday of June, in the year eighteen hundred and ninety-nine (1899) and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of such persons only as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence.

STATUTE DIRECTORY.—An objection that the jury list from which the grand jury is drawn does not contain the names of all the persons in the county qualified to sit as jurors, can not be sustained, since the statute prescribing how the jury lists shall be prepared is merely directory. Haywood, 73—437.

The regulations contained in sections 1722 and 1728 of The Code are directory only, and a failure to observe them does not vitiate the *venire* in the absence of fraud or corruption on the part of the commissioners. Perry, 122—1018.

It is not sufficient ground to quash an indictment that the commissioners failed to comply with this section in that they *selected* for jurors such as had not paid their taxes. The statute is directory, and a challenge to grand jurors on this account, unless some actual corruption is shown, will not be sustained. Fertilizer Co., 111—658.

Sec. 306 (1723). List of names to be made out. 1868, c. 9, s. 2.

A list of the names thus selected shall be made out by the clerk of the board of commissioners, and shall constitute the jury list: *Provided*, that no practicing physician, regular minister of the gospel, keepers of public grist mills, or regularly licensed pilots, members of fire companies and of the state guard, shall be required to serve as jurors.

Sec. 307 (1724). Commissioners to insert names in jury lists. 1868, c. 9, s. 3.

If the list so made out does not contain the names of all the inhabitants who are qualified as provided to serve as jurors, the commissioners shall insert the names of such inhabitants in the jury list.

Sec. 308 (1725). Commissioners to examine jury lists, and may examine any person on oath. 1868, c. 9, s. 4. 1889, c. 559.

After the jury lists have been made out in accordance with secs. 1723 and 1724, the commissioners shall carefully examine the jury lists, compare the same with the tax returns, and diligently inquire whether any persons qualified to be jurors as provided are omitted, and whether any persons not qualified to be jurors, as therein provided, have been inserted, and if any have been inserted not possessing the requisite qualifications, they shall strike such names from the jury lists, and in order to obtain full information on the subject the commissioners may examine on oath any person they may think proper.

Sec. 309 (1726). Names to be put in box. 1868, c. 9, s. 5. 1889, c. 559. 1897, c. 539.

The commissioners shall cause the names on their jury list to be written on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions

marked Nos. 1 and 2, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

Sec. 310 (1727). How jury shall be drawn. 1868, c. 9, s. 6. 1868-'9, c. 175. 1889, c. 559. 1897, c. 539.

At least twenty days before the regular fall and spring term of the superior court in each year, the commissioners shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls, and the persons whose names are inscribed on said scrolls shall serve as jurors at the fall and spring terms of the superior court to be held for the county respectively ensuing such drawing, and the scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service; and the trial jury which has served during the first week, shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

NUMBER OF GRAND JURORS.—A motion to quash on the ground that forty-four instead of thirty-six jurors were drawn may be properly refused, since the provision that only thirty-six should be drawn is only directory. *Watson*, 104—735.

Sec. 311 (1728). Jurors having suits pending. 1868, c. 9, s. 7.

If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

Sec. 312 (1729). Case of death or removal from the county. 1868, c. 9, s. 8. 1889, c. 559. 1897, c. 539.

If any of the persons drawn to serve as jurors be dead, removed out of the county the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

Sec. 313 (1730). How drawing of jury to continue. 1868, c. 9, s. 9.

The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2, shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

HOW BOXES NUMBERED.—The partitions of the jury box were marked "jurors drawn" and "jurors not drawn," instead of "No. 1" and "No. 2," and the key, which unlocked both boxes, was deposited with the register of deeds: *Held*, that a special venire drawn from the box marked "jurors not drawn," was legal. Potts, 100—457.

Sec. 314 (1731). In case of a special term. 1868, c. 9, s. 10.

Whenever a special term of the superior court is ordered for the county, the commissioners, fifteen days before the holding of such special term, shall draw eighteen jurors to attend said court as herein provided for drawing jurors of the regular terms thereof.

Sec. 315 (1732). When commissioners fail to draw a jury. 1868, c. 9, s. 11.

If the commissioners for any cause fail to draw a jury for any term of the superior court, regular or special, the sheriff of the county and the clerk of the commissioners in the presence of, and assisted by two justices of the peace of the county, shall draw such jury in the manner above described, and if a special term shall continue for more than two weeks, then for the weeks exceeding two a jury or juries may be drawn as in this section provided.

Sec. 316 (1733). Jurors to be summoned, and to attend until discharged by court; tales jurors, how summoned, and qualifications. R. C., c. 31, s. 29. 1779, c. 156, ss. 6, 9. 1806, c. 694, s. 1. 1830, c. 42. 1868, c. 9, s. 12. 1879, c. 200. 1881, c. 226.

The clerk of the board of county commissioners shall, within five days from the drawing, deliver the list of the jurors drawn for the superior court to the sheriff of the county, who shall summon the persons therein named to attend as jurors at such court which summons shall be served, personally, or by leaving a copy thereof at the house of the juror, at least five days before the sitting of the court to which he may be summoned; and jurors shall appear and give their attendance until duly discharged; and, that there may not be a defect of jurors, the sheriff shall by order of court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, to serve on the petit jury, and on any day the court may discharge those who have served the preceding day: *Provided*, that it shall be a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such terms of the court.

JUROR MUST ACT TO BE DISQUALIFIED.—To render a juror disqualified because he has served on the jury within two years past it must appear not only that he has been summoned, but that he has *acted* within that time. Whitfield, 92—831.

Sec. 317 (1741). Exceptions to jurors, when to be taken.

All exceptions to grand jurors for and on account of their disqualification shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken the same shall be deemed to have been waived.

HAVING SUIT WHEN BILL FOUND.—The fact that a grand juror had a suit pending and at issue when the bill was found, is sufficient ground for quashing the indictment if the motion is made in apt time. Gardner, 104—739.

CONSTITUTION.—An act of the legislature making the concurrence of nine members of the grand jury sufficient, is unconstitutional. Barker, 107—913.

ACTUAL PRESENCE OF GRAND JUROR WHEN BILL FOUND.—Defendant is not required to show affirmatively that a grand juror who was disqualified by having a suit on the docket was actually present and participated in the deliberations of the grand jury when the bill was found. Smith, 80—410.

Sec. 318 (1742). Foreman of grand jury to administer oaths. 1879, c. 12.

The foreman of every grand jury duly sworn and impaneled in any of the courts shall have power to administer oaths and affirmations to persons to be examined before it as witnesses: *Provided*, that the said foreman shall not administer such oath or affirmation to any persons except those whose names are endorsed on the bill of indictment by the officer prosecuting in behalf of the state, or by direction of the court: *Provided further*, that the foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the jury.

FAILURE TO MARK NAMES OF WITNESSES.—The above section is merely directory, and the omission of the foreman to mark on the bill the names of the witnesses sworn and examined is no ground for quashing the bill or arresting the judgment. Following *State v. Sheppard*, 97—401. *Hollingsworth*, 100—535.

The omission of the foreman of the grand jury to put a X before the name of the witnesses is not ground for the arrest of judgment, since such endorsements form no part of the record. A motion to quash on such ground made after pleading to the indictment may be overruled in the discretion of the court, since defendant might have pleaded in abatement and shown, if such was the fact, that the witnesses had not been sworn. *Sheppard*, 97—401.

The failure of the foreman to sign the endorsement on the back of a bill underneath the words "those marked thus X sworn and sent," is not sufficient ground to sustain a motion to quash, or in arrest of judgment. *Lanier*, 90—714.

It is not necessary that it should appear that the state's witnesses were sent before the grand jury. *Frizzell*, 111—722.

DRAWING AND SWEARING GRAND JURY.—The record stated that the persons impaneled as grand jurors, among whom was the one appointed foreman, were "duly drawn, sworn, and the court having appointed J P foreman are charged": *Held*, that it sufficiently appeared that the foreman had been properly drawn and sworn. *Weaver*, 104—758.

BILL NOT RETURNED IN OPEN COURT—HOW PROVED.—The recital in an indictment that "the jurors upon their oath present," etc., raises a presumption, when accompanied by the endorsement of "a true bill" signed by the foreman, that it was duly returned and presented in open court, and proof to the contrary can only be heard on plea in abatement made in apt time. Weaver, 104—758.

ENDORSEMENT OF TRUE BILL.—The endorsement on the back of an indictment "a true bill," raises a presumption that every member of the grand jury concurred in the finding of the bill. McNeill, 93—552.

DEFENDANTS NOT TO BE EXAMINED AGAINST EACH OTHER.—Where there are two defendants, it is improper to examine each against the other before the grand jury for the purpose of obtaining a true bill against both. Krider, 78—481.

WITNESSES NOT TO BE EXAMINED PUBLICLY.—A judge of the superior court has no right to require a grand jury to have the witnesses on the part of the state examined publicly. Branch, 68—186.

WITNESSES, HOW SWORN.—The statute simply gives an additional mode of swearing witnesses to testify before the grand jury, but does not abrogate the mode formerly prevalent of swearing them in open court. Allen, 83—680.

NEW BILL FOR SAME OFFENCE. WITNESSES EXAMINED.—Where an indictment is quashed and a new bill for the same offence sent and returned by the grand jury "a true bill," without a re-examination of the witnesses, the new bill should be quashed. Ivey, 100—539.

PRESENTMENT NEED NOT BE SIGNED.—A presentment need not be signed by any one; it is the returning of the indictment in open court and its being there recorded that makes it effectual. Cox, 28 (6 Ired.), 440.

Sec. 319 (1738). In capital cases judge may issue a special venire. R. C., c. 35, s. 30. 1830, c. 27, s. 1.

Whenever a judge of the superior court shall deem it necessary to a fair and impartial trial of any person charged with a capital offence, he may issue to the sheriff of the county in which the trial may be, a special writ of *venire facias*, commanding him to summon such number of the freeholders of said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when the same shall be returnable, with the names of the jurors summoned.

Sec. 320 (1739) Special venire, how drawn and summoned.

Whenever a judge shall deem a special *venire* necessary, he may at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box No. 1, by a child under ten years of age. And the names so drawn (being freeholders) shall constitute the special *venire*, and the clerk of the superior court shall insert their names

in the writ of *venire*, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the said sheriff. If the special *venire* is exhausted before the jury is chosen, the judge in his discretion may order another special *venire* to be drawn and summoned in like manner as the first, until the jury has been chosen. The scrolls, containing the names of the persons drawn as jurors from box No. 1 shall, after the jury is chosen, be placed in box No. 2; and if box No. 1 is exhausted before the jury is chosen, the drawing shall be completed from box No. 2, after the same shall have been well shaken.

CONSTITUTION.—Laws of N. C., 1885, c. 63, sec. 19, prescribing the mode for drawing a *special venire* for the criminal court of New Hanover, is substantially the same in effect as The Code, sec. 1739, and is not unconstitutional. Jones, 97—469.

WHERE JUROR HAS FORMED AND EXPRESSED AN OPINION.—Where a juror, on his examination, states that he had formed an opinion that the prisoner was guilty on report merely, and that it would require evidence to remove the impression, yet, he could, on hearing the evidence and the judge's charge, disregard the opinion, and the trial judge decides that the juror is indifferent, the decision of the court is unreviewable. Potts, 100—457.

A juror in answer to the question whether he had formed and expressed an opinion as to the *guilt or innocence* of the prisoner, said that he had, and the prisoner challenged him for cause, but the court suggested to counsel to ask whether the opinion expressed was that the prisoner is *guilty*, which counsel declined to do, and the challenge was disallowed: *Held*, no error, since it is incumbent on him who challenges to show that he is the party likely to be prejudiced. Efler, 85—585.

It is no good cause of challenge that a juror has formed and expressed an opinion adverse to the prisoner, such opinion being founded on rumor, when the juror states that he can try the case according to the law and evidence, uninfluenced by any opinion he may have formed from such rumor. Collins, 70—241.

OPINION BASED ON RUMOR.—One who states that he has formed and expressed an opinion upon defendant's guilt based upon rumors, but that he is not so prejudiced that he could not render a fair and impartial verdict, is a competent juror. Green, 95—611.

WHEN JUROR HAVING EXPRESSED OPINION, COMPETENT.—Where a juror says that he has formed and expressed the opinion that the prisoner is guilty, but that his mind is fair and unbiased, and that he can hear the evidence and render a verdict without being in any degree influenced by what he has heard or said, he is a competent juror. Kilgore, 93—533.

An exception to a finding that a juror is impartial can not be sustained where the juror declares that his adverse opinion had been founded on rumors and that he, after hearing the evidence, could render a fair and impartial verdict. DeGraff, 113—688.

Evidence that a juror had stated a few minutes before being called "that he could not serve because he had made up his opinion," will not entitle defendant to a new trial, because the first statement was not under oath and was contradicted by the oath of the juror who swore that he had not formed an opinion. Scott, 8 (1 Hawks), 25.

PAYMENT OF TAXES.—The judge when ordering a special *venire* may direct the sheriff to summon only freeholders who have paid their taxes

for the preceding year, who have not served on the jury within the past two years, who have no suits in court, and who are not under indictment. Codey, 119—908.

An objection that the special *venire* was summoned by the sheriff as prescribed by section 1738 of The Code instead of being drawn from the jury box as prescribed by section 1739 is untenable, since the latter method is discretionary. Smarr, 121—669.

A tales juror called on a trial in April, 1894, is not disqualified because he had not paid his taxes for 1893, he having paid them for 1892. Sherman, 115—773.

POLLING THE JURY.—On polling the jury, a juror responded, "Well, I suppose I must go with the rest," but when directed by the court to respond "guilty or not guilty," he answered "guilty": *Held*, proper to receive the verdict. Sheets, 89—543.

Where defendant is present when a verdict of guilty is returned against him but his attorney is absent, he can not demand a new trial as a matter of right on the ground that the jury was not polled, and if his attorney had been present he would have demanded that the jury be polled. The granting of such motion is in the discretion of the judge. Jones, 91—654.

Both defendant and the solicitor for the state have the legal right to demand that the jury be polled. Young, 77—498.

After retiring, a proposition was assented to by the jury that the verdict of a majority should be returned as the verdict of the jury; another ballot was taken, some of the jurors still voting not guilty, but after further deliberation a verdict of guilty was returned. The jury was then polled and each responded guilty. During their deliberation the jury was allowed to separate, but were still under charge of officers of the court: *Held*, that defendant was not entitled to a new trial. Harper, 101—761.

Polling the jury is a privilege, but it is not error to receive the verdict without polling unless the defendant requests it in apt time. Best, 111—638.

VARIANCE IN NAME.—Where the name of a juror summoned is J L B, and his name is entered on the scroll as J S B, the variance is immaterial. Mills, 91—581.

MATTERS NOT MATERIAL TO JUROR'S COMPETENCY.—Where a juror on his *voire dire* states that he had said it would injure any attorney politically with certain persons to appear for the prisoner, he can not be required to give the names of those persons, since such matter is not material to the question of the juror's indifference. Mills, 91—581.

SPECIAL VENIREMEN MUST BE FREEHOLDERS.—The only qualification required of jurors summoned on a special *venire* is that they shall be freeholders. Kilgore, 93—533.

A tales juror must have the same qualifications as a regular juror with the additional one of being a freeholder. Sherman, 115—773.

MISCONDUCT OF JURY.—Where jurors purchased and drank whiskey and "some of them were under its influence" while deliberating on their verdict, the verdict returned by the jury was void, and a mistrial should have been granted to the defendant. Jenkins, 116—972.

NO APPEAL WHEN FACTS FOUND.—Where the trial judge finds the facts in regard to the alleged misconduct of the jury his refusal of a new trial on that ground is not reviewable. Fuller, 114—885.

IMPEACHING VERDICT.—The supreme court will not look into affidavits in support of a motion to set aside a verdict on account of the misconduct of the jurors, but will look only to the record presented, and when such

motion is designed to be submitted to their revision, the facts must be ascertained by the court and spread upon the record. Smallwood, 78—560.

A juror can not be examined as a witness to impeach the verdict of the jury of which he was a member. Brittain, 89—481.

ORIGINAL PANEL MUST BE FIRST EXHAUSTED.—Resort can not be had to the *special venire* before the original panel is exhausted, including those who have been stood aside. Shaw, 25 (3 Ired.), 532.

CHALLENGE AFTER ACCEPTANCE BY PRISONER.—Where the incompetency of a juror is not ascertained until he has been passed to and accepted by the prisoner, the court may *then* allow a challenge by the state. Vann, 82—631.

Where, a juror, already in the box, after he has been passed to and accepted by the defendant, rises and states that he has served on the jury within two years past, it is not error in the court to *then* allow a challenge by the state. Following *State v. Jones*, 80—415. Vestal, 82—563.

WHERE JURY IS OBTAINED BEFORE PEREMPTORY CHALLENGES EXHAUSTED.—Where a jury is obtained before the prisoner exhausts his peremptory challenges, an exception for error in overruling a challenge for cause can not be considered. Pritchett, 106—667.

PREJUDICE AGAINST COLORED PERSONS.—A colored person on trial for crime has a right to challenge a juror who "believes that he can not do impartial justice between the state and a colored person," and the cause of challenge, if sustained, is good. McAfee, 64—339.

FREEHOLDER.—A special *venireman* drawn for criminal court of New Hanover, under Laws 1885, c. 63, is not required to be a freeholder. Freeman, 100—429.

WHEN ERROR IN REFUSING CHALLENGE REMOVED.—Error in refusing to allow a challenge is removed when the juror is then peremptorily challenged, and the prisoner obtains a jury without exhausting his peremptory challenges. Freeman, 100—429.

SERVING ON JURY WITHIN TWO YEARS.—A juror of the original panel can not be challenged on the ground that he has served upon a jury in the same court within two years. Brittain, 89—481.

TENANT BY THE CURTESY.—A tenant by the curtesy initiate is a freeholder under the statute. Mills, 91—581.

CHALLENGE BY THE STATE AFTER PASSING.—It is error to permit the state to peremptorily challenge a juror after he has been passed by the state and tendered to the prisoner. Fuller, 114—885.

SUIT PENDING.—A juror who has a suit "pending" but not "at issue" at the term at which he was drawn to serve is not disqualified. Smarr, 121—669.

RELATIONSHIP OF JUROR.—The fact that the great-grandmother of a juror was the sister of the grandmother of the prisoner, brings the juror within the ninth degree of kinship to the prisoner, and he may be properly challenged by the state. Perry, 44 (Busb.), 330.

A juror related to the prisoner within the ninth degree may be properly rejected upon challenge by the state. Potts, 100—457.

Where it appears that the juror's wife was cousin to the prisoner's former wife, who is now dead, leaving no children, there is no cause of challenge, the affinity having ceased with her death. Shaw, 25 (3 Ired.), 532.

The fact that a juror is first cousin to the prisoner is no good cause of challenge by the prisoner, unless ill feeling or bad blood is shown to exist between them. Ketchey, 70—621.

WHEN JUROR AN ATHEIST.—It is not error to refuse a motion for a new trial after a verdict of guilty, on the ground that one of the jurors was an atheist, and that fact was not discovered until after verdict. A challenge for such cause not made before the juror is sworn, is deemed to be waived. Davis, 80—412.

WHEN PROSECUTOR QUALIFIED AS A JUROR.—A person is not disqualified as a juror, for the reason that he is the prosecutor in another criminal action to which the defendant has not pleaded. Brady, 107—822.

NON-RESIDENT JUROR.—The fact that a juror is not a resident of the county in which the indictment is tried, is a good ground for challenge, but not for a new trial after verdict is rendered. White, 68—158.

CAUSE ADMITTED—EFFECT OF ADMISSION.—Where the cause of challenge is admitted by the state, the prisoner is bound by his challenge, and can not afterwards have the matter tried. Creasman, 32 (10 Ired.), 395.

MISDEMEANOR.—A challenge for cause may be made in a trial for a misdemeanor. Fulton, 66—632.

CHALLENGE TO THE FAVOR.—A challenge to the favor is properly sustained where it appears that the juror is attending court, whether under subpoena or not, in the expectation of being called as a witness for the opposite party, and the danger of bias is not removed by showing that he has no knowledge of the material facts of the case, but expected to testify only as to the character of the defendant. Barber, 113—711.

AMENDMENT.—The trial judge, in his discretion, may amend an order for a special *venire* so as to increase or decrease the number. Brogden, 111—656.

ALIENS, JURY DE MEDITATE LINGUAE NOT ALLOWED.—An alien is not entitled to a jury *de meditare lingue* in this state. Antonio, 11 (4 Hawks), 200.

COURT DECIDES AS TO QUALIFICATIONS—NO REVIEW.—The court is the judge of the qualifications of a juror, and its determination is not reviewable, and, in its discretion, it may permit a challenge by the state for cause after the juror has been tendered to defendant and before the jury is empaneled. Green, 95—611.

CHALLENGE TO THE ARRAY.—A challenge to the array on the ground that the prisoner is a person of color, and no person of his own color is summoned on the *special venire*, can not be sustained. The right to a jury *de meditare lingue* is not a principle of common law, and never obtained in this state. Sloan, 97—499.

The action of a trial judge in determining the qualifications of a juror, if erroneous, is ground for challenge to the array by a motion to quash and set aside the entire panel, and, in the absence of such challenge a defendant can not be allowed to take advantage of the alleged error after trial and judgment. Moore, 120—570.

The fact that the sheriff's return to a writ for a special *venire* states that he had not summoned one juror because he was dead, and had not summoned three others because they could not be found, is no ground for a challenge to the array. Speaks, 94—865.

The integrity and fairness of the entire panel are not affected by the fact that one man named in the writ had removed from the county; that another was dead when the list was revised; that one was not summoned, nor by the fact that the sheriff, in copying the list omitted, by mistake, the name of one who in consequence was not summoned. Whitt, 113—716.

The jurors were selected from a special *venire* summoned from the general jury list irrespective of their qualifications as freeholders, instead

of from a *venire* of freeholders only, as required by sections 1738 and 1739 of The Code, but none but qualified freeholders were empanelled, and there was no challenge to the array: *Held*, that the defendant was not prejudiced by such method of summoning the jurors. Moore, 120—565.

In the absence of any allegation that the sheriff acted corruptly or with partiality in summoning the *venire*, or that anything had been done affecting the "integrity and fairness of the entire panel," it is not a ground of challenge to the array that the sheriff failed to summon several of the special *venire* drawn from the jury box or that the jury box was not revised by the county commissioners. Stanton, 118—1182.

CHALLENGE BY ONE DEFENDANT AFTER JUROR ACCEPTED BY THE OTHER.—J and O being both on trial, a juror was tendered to J and accepted, but was then tendered to O who challenged him peremptorily, and he was stood aside, and J excepted. J exhausted his peremptory challenges before a jury was obtained: *Held*, that J had no right to complain of a challenge by his co-defendant, as the right of challenge is a right to reject and not to select. Jacobs, 106—695.

REVISING THE JURY LIST.—The fact that the county commissioners had not revised the jury box at the last September meeting, and that the boxes were not kept locked, but were kept in a place easily accessible to unauthorized persons, is no ground of challenge to the array, it not appearing that the boxes had been tampered with. Hensley, 94—1021.

The fact that one of the special *venire* was dead, and another had removed from the county, before the time when the commissioners should have revised the jury list, is no ground for challenge to the array. *Ib.*

The requirements of the statute as to the manner or time of drawing the jury being merely directory, an objection that the jury list was not revised when required will not be considered in the absence of proof of bad faith or corruption on the part of the officers charged with that duty, or when it does not appear that the party objecting has been in some way prejudiced thereby. Smarr, 121—669.

VENIRE IN NO PARTICULAR CASE.—It is not necessary that it appear that the special *venire* was made in the case of the defendant, but it is sufficient if it was made at the term at which the trial was had. Murph, 60 (1 Winst.), 129.

STANDING ASIDE.—The right to postpone showing cause and to stand jurors aside belongs exclusively to the state. Bone, 52 (7 Jones), 121.

The fact that the judge told the solicitor how many jurors he might stand aside or put to the foot of the panel, can not be assigned as error when no harm is shown to have resulted to the prisoner. Sloan, 97—499.

A reasonable number of jurors of any particular panel, may, in a capital felony, at the instance of the state, be required to stand aside until all the other jurors of that panel shall have been called; but when all the others have been called, the prisoner has the right to have the jurors so stood aside tendered him, or challenged by the state, before another *venire* is summoned. Hensley, 94—1021.

WHEN THOSE STOOD ASIDE MUST BE TENDERED.—Where the original panel is exhausted before a jury is obtained, those of the original panel stood aside at the instance of the prosecution must be brought forward and challenged or tendered to the prisoner, before resort can be had to the special *venire*. Washington, 90—664.

BYSTANDERS—WHO ARE.—Persons who are not bystanders in court may be summoned as talesmen, for when they come in they are bystanders. McDowell, 123—764.

DRAWING FROM BOX.—The practice of drawing the special *venire* from the box is commended. Brogden, 111—656.

JUROR REQUESTING TO BE EXCUSED.—A judge, in his discretion, may excuse a juror at his own request as a favor to him and before he has been accepted. Barber, 113—711.

SHERIFF'S RETURN MAY BE AMENDED.—Where a sheriff, in making his return on a writ and list of special *venire*, endorsed thereon: "Received October 25, 1893, executed October 30, 1893, by summoning one hundred and fifty men," it was within the discretion of the court, at the term to which the writ was returnable, to permit an amendment of the return so as to show those actually summoned and those not with the reasons why they were not. Whitt, 113—716.

MINOR WHEN SUMMONED.—The fact that a grand juror was a minor when his name was put on the jury list is immaterial if he was of age at the time he served. Perry, 122—1018.

DEFENDANT MUST SHOW DISQUALIFICATION.—The burden of showing a disqualification of a grand juror is upon the defendant. Perry, 122—1018.

JUDGE CAN NOT EXTEND THE TIME.—The discretionary power of the judge in respect to challenges of jurors is confined to challenges for cause, and he has no more authority to extend the time for making peremptory challenges beyond the limit fixed by the statute than he has to allow more than four challenges. Fuller, 114—885.

TRANSCRIPT NEED NOT NAME GRAND JURY.—It is not necessary that the transcript of the record should contain a list of the grand jurors. Jimmerson, 118—1173.

SECOND VENIRE MAY BE ORDERED.—Where a special *venire* is exhausted without completing the jury the court may order a further *venire* to be summoned at once from the bystanders. Stanton, 118—1182.

MOTION TO QUASH.—If the motion to quash for disqualification of a grand juror is made before plea, the defendant has a right to have the motion granted; if made after plea, but before the jury is impanelled, it may be granted or refused in the discretion of the court, but if made after the jury is sworn the objection shall be deemed to have been waived. Gardner, 104—739.

WHEN AN APPEAL WILL LIE.—Where the motion to quash is made after plea, but before the jury is impanelled, and the judge refuses on the ground that it was not in apt time, this is error, but if he puts his refusal upon the exercise of his discretion, or assigns no reason, no appeal lies. Gardner, 104—739.

To render a person eligible as a juror, it must appear that he has paid his taxes for the fiscal year next preceding the time when his name was placed on the jury list. *Ib.*

OMISSION TO MARK WITNESSES SWORN.—The omission of the foreman to mark on the indictment the names of the witnesses sworn and examined, is no ground for quashing the bill. The provision requiring this to be done is directory merely, and the state may show by proof that the witnesses were sworn. Hines, 84—810.

MOTION IN APT TIME—IF BEFORE PLEA.—Defendant having been arraigned and called on to answer the charge, his counsel suggested his insanity and inability to plead; the issue as to his insanity was then submitted and the jury returned a verdict that he was insane, and he was removed to the asylum. Next day the court set the verdict aside and defendant was brought back, and the cause continued "*without prejudice*." At the next term defendant asked for an order of removal, which being refused he

asked for a continuance, which was also refused. He then moved to quash the indictment on the ground that one of the grand jurors was disqualified when the bill was found by reason of his not having paid his taxes for the preceding year. The court ruled that the motion came too late: *Held*, that the motion was made in apt time, since the motion to remove was premature, no plea of not guilty having been made, and the continuance being "without prejudice," the legal rights of defendant remained as at first. Haywood, 94—847.

EVIDENCE UNNECESSARY, WHEN.—No evidence of the disqualification is necessary when the court refuses the motion to quash, solely on the ground that it is too late. Haywood, 94—847.

A motion to quash for the disqualification of a grand juror made before plea will be granted as a matter of right; if made after plea it will be granted or not in the discretion of the judge. DeGraff, 113—688.

A motion to quash, made before plea, on the ground that three of the grand jurors had failed to pay their taxes for the preceding year was properly sustained. Fertilizer Co., 111—658.

CHALLENGE—GRAND JUROR A SON OF THE PROSECUTOR.—The fact that a member of the grand jury that found an indictment for larceny was the son of the prosecutor whose goods are charged to have been stolen, and that the said grand juror "actively engaged in finding said bill a true bill," is not sufficient to support a motion to quash made before arraignment by plea in abatement, and a demurrer to such plea will be sustained. Sharp, 110—604.

NO APPEAL, WHEN.—Where a motion to quash for the disqualification of a grand juror is made after plea and declined without the assignment of any reason, it will be assumed that it was denied in the discretion of the court, and no appeal will lie. DeGraff, 113—688.

When a grand juror was of age when he served in February, 1897, but reached his majority in September, 1896, the fact that he had not paid his taxes for the preceding year (1895) is no tenable objection to his competency to serve, since he could not have been liable for a poll tax and may not have had any property liable for taxation, and especially when it is found as a fact that no taxes were assessed against him for 1895. Besides a grand juror is not required to be a freeholder. Perry, 122—1018.

A tales juror who has not paid his taxes for the fiscal year preceding the first Monday in September next before the time he is called on to serve, may be excluded on being challenged. Hargrave, 100—484.

NO SEPARATION IN CAPITAL CASE.—If the jury, in a capital case, separate without returning a verdict, the prisoner can not be tried again for that offence. Garrigues, 2 (1 Hay.), 276.

In the trial of a capital felony the judge may, for sufficient cause, discharge the jury and hold the prisoner for a new trial. Scruggs, 115—805.

PERSONS EXEMPT.—A person who is exempt by law from serving on juries, is not bound to serve on a *special venire*. Whitford, 34 (12 Ired.), 99.

Sec. 321 (1200). In capital cases state may challenge four jurors, in others two. R. C., c. 35, s. 33. 33 t.d.w. l., stat. 4. 1827, c. 10.

In all capital cases, the prosecuting officer on behalf of the state shall have the right of challenging peremptorily four jurors: *Provided*, said challenge is made before the juror is tendered to the prisoner; and if he will challenge more than four jurors he shall assign for his challenge a cause certain; and in all other

cases of a criminal nature, a challenge of two jurors shall be allowed in behalf of the state, and challenges also for a cause certain; and in all cases of challenge for cause certain, the same shall be inquired of according to the custom of the court.

Sec. 322 (1199). In capital cases, defendants may challenge twenty-three jurors, in other cases four; allowed aid of counsel. R. C., c. 35, s. 32. 1871-'2, c. 39. R. S., c. 35, ss. 19, 21. 1777, c. 115, s. 85. 1812, c. 833. 1801, c. 592, s. 1. 1826, c. 9. 22 Hen. VIII., c. 14.

Every person on joint or several trial for his life, may make a peremptory challenge of twenty-three jurors and no more; and in all joint or several trials for crimes and misdemeanors, other than capital, every person on trial shall have the right of challenging peremptorily, and without showing cause, four jurors and no more. And to enable defendants to exercise this right, the clerk in all such trials shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel before the jury shall be impaneled to try the issue; and in all trials whether for capital or inferior offences, the defendants may have the aid and assistance of counsel in making challenges to the jury, and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors.

MISTAKE IN NOT RECALLING JUROR STOOD ASIDE.—Where one of the *venire* is challenged by the state and directed to retire till the panel is gone through with, and is not afterwards recalled, the clerk declaring that the panel has been perused, through a mistake in supposing that the juror had been excused for the reason that he was a witness, and the prisoner makes no objection to another panel being ordered, thus acquiescing in the statement of the clerk that the panel had been perused, a new trial will not be ordered. Lytle, 27 (5 Ired.), 58.

OFFENCE LESS THAN CAPITAL.—Where the indictment is for an offence less than capital, and defendant has challenged four jurors peremptorily, he can not challenge a fifth peremptorily if he has first challenged one of the four for cause which was properly disallowed. Hargrave, 100—484.

Sec. 323. Jurors, misdemeanor to intimidate. 1891, c. 87.

Any person who shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as juror or witness in any of the courts of this state, and any person who shall by threats, menaces or in any other manner prevent or deter or attempt to prevent or deter any person summoned or acting as such juror or witness from attendance upon such court shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court.

Sec. 324. Grand juries not required to come into court in a body except in capital cases. 1897, c. 29.

The grand juries of the superior, criminal and inferior courts of the various counties of this state are hereby empowered to return their bills of indictment in open court through their acting foremen respectively, and, except in felonies where life is the forfeit in cases of conviction, it shall not be necessary for the entire grand jury, or a majority of them, to return their bills of indictment in open court, in a body, but may return them in a manner herein provided.

JUSTICES OF THE PEACE.

Sec. 325 (645). Special constables in certain cases appointed by justices. R. C., c. 24, s. 11. 1741, c. 24, s. 9.

For the better executing any precept or mandate in extraordinary cases, any justice of the peace may direct the same in the absence of, or for want of a constable, to any person not being a party, who shall be obliged to execute the same, under like penalty that any constable would be liable to.

JUSTICE SOLE JUDGE AS TO NECESSITY FOR SPECIAL CONSTABLE.—The justice of the peace is the sole judge of the "extraordinary cases" in which a special constable shall be appointed under this section. *Armistead*, 106—639.

UNRESTRICTED DEPUTATION.—Where the deputation is unrestricted as, "J W F is hereby appointed special constable," it authorizes the service of all other process in that case by the special deputy, including the execution of a *mittimus*. *Distinguishing State v. Dean*, 3 *Jones*, 393. *Armistead*, 106—639.

DEPUTATION SHOULD SHOW ABSENCE OF REGULAR OFFICER.—While it is not necessary, still it is better for the special deputation to state that it is given for the want of a regularly constituted officer. *Dula*, 100—423.

EVIDENCE OF OFFICIAL CAPACITY OF SPECIAL DEPUTY.—The fact that defendants were arrested under the second order of arrest by the same special deputy who executed the original warrant, is some evidence that they knew of the capacity in which the officer was acting when making the second arrest. *Dula*, 100—423.

RESTRICTED DEPUTATION DOES NOT AUTHORIZE EXECUTION OF MITTIMUS.—A special deputation "to execute the within warrant" for the arrest of a person does not authorize the deputy to execute a *mittimus* in the case, and he is not liable for permitting the escape of the person arrested and committed to his custody under the *mittimus*, since his deputation ceased when he returned the warrant. *Olan*, 48 (3 *Jones*), 393.

WHO MAY BE APPOINTED.—A justice, in extraordinary cases, may appoint any one, not a party, to execute his mandate, and his decision is conclusive as to when such "extraordinary cases" arise for the exercise of such power. *Wynne*, 118—1206.

Sec. 326 (906). Justices of the peace to make returns of all criminal actions disposed of by them to the clerk of the superior, criminal or inferior court. 1869-'70, c. 110.

It shall be the duty of each justice of the peace on or before Monday of every term of the superior, criminal or inferior court of his county to furnish the clerk of said court with a list of the names and offences of all parties tried and finally disposed of by such justice of the peace, together with the papers in each case, in all criminal actions, since the last term of the superior, criminal or inferior court. The clerk of the court shall hand a copy of such list to the solicitor and to the grand jury at each term of the court; and no indictment shall be found against any party whose case has been so finally disposed of by any justice of the peace: *Provided*, that this section shall not be deemed to extend or enlarge or otherwise affect the jurisdiction of justices of the peace, except as provided by law.

NAMES OF CASES DISPOSED OF—INDICTMENT.—A motion in arrest of judgment, on the ground that the indictment does not state the names of the cases finally disposed of by defendant, can not be sustained. *Foy*, 98—744.

JUSTICE OF THE PEACE—REPORT OF CASES.—On indictment against a justice of the peace for violation of section 326 (The Code, sec. 906), requiring justices of the peace to make return to the superior court of all criminal cases "finally disposed of" by them, the jury returned a special verdict finding that such failure was attributable to the fact that the defendant had no such cases before him during the period set out in the indictment: *Held*, that the defendant was not guilty, as the law does not require a justice to make report that he has finally disposed of no cases. *Latham*, 110—.

Sec. 327 (907). Actions removable from one justice of the peace to another upon affidavit; proviso. 1880, c. 15. 1883, c. 66.

In all proceedings and trials, both criminal and civil, before justices of the peace, the justice before whom the writ or summons is returnable, shall upon affidavit made by either party to the action that he is unable to obtain justice before him, move the same to some other justice residing in the same township, or to the justice of some neighboring township if there be no other justice in said township: *Provided*, that no cause shall be more than once removed: *Provided further*, that such motion to remove shall be made before evidence is introduced.

NO REMOVAL BEYOND TOWNSHIP OF JUSTICE.—The justice can not remove the place of trial beyond his own township. *Warren*, 100—489.

Where a case is removed to a justice of a neighboring township when there is another justice in the same township in which the action commenced, the justice to whom the case is thus removed has no jurisdiction and his judgment is void. *Ivie*, 118—1227.

Sec. 328. Justices to furnish itemized statements of costs. 1887, c. 297.

In all trials before justices of the peace it shall be lawful for plaintiff or defendant before payment of costs, to demand of the justice or justices before whom a trial is held an itemized statement of costs, and any justice or justices refusing to furnish such statement shall be guilty of misdemeanor and upon conviction shall be punished at the discretion of the court.

Sec. 329. Justices to take bonds upon continuance. 1889, c. 133.

(1) Upon the continuance of any criminal action returned before any justice of the peace for trial in which the said justice would be authorized to take bail on a finding of probable cause, or in which action he would have final jurisdiction, it shall be the duty of said justice of the peace, and he is hereby authorized and directed to take such bond payable to the state of North Carolina, on the same being tendered by the accused, with such security as in his opinion will be sufficient to insure the appearance of the accused before him for trial at the time and place (which shall be mentioned in said bond) set for the trial.

(2) On the failure of the accused to appear at the time and place mentioned in said bond and answer the charges, or having appeared shall depart the court without leave thereof first had and obtained, it shall be the duty of the said justice of the peace then presiding to enter judgment *nisi* against the principal and his sureties in said bond for the amount mentioned therein: *Provided*, the sum does not exceed the sum of two hundred dollars, and immediately issue notice to the principal and the sureties in said bond, giving ten days' time, specifying time and place, to appear and show cause, if any they have, why the said judgment *nisi* should not be made final.

(3) If the defendant shall fail to appear or show satisfactory reasons for not complying with the provisions of said bond, it shall then be the duty of the justice of the peace to render a final judgment thereon for the amount of the same, and immediately make and transmit to the clerk of the superior court a transcript thereof, which shall be entered upon the judgment docket of said court, and the clerk shall issue execution on said final judgment against the principal and his sureties for the collection of the amount thereof as in other judgments in behalf of the state.

(4) If the bond provided for in the first section of this act shall exceed the sum of two hundred dollars, and the accused shall fail to appear as therein provided to answer the charge, or having appeared shall depart the court without leave first had and ob-

tained, it shall be the duty of the said justice to have the accused called, and enter upon the bond that the defendant was called and failed to answer, and immediately return the original papers in the case, together with the bond, to the clerk of the court having jurisdiction to try such action, who shall immediately enter the case upon the criminal docket of his court and enter judgment *nisi* for the amount of the said bond, and issue notice to the accused and his sureties to appear at the next term of said court to show cause why said judgment should not be made final and proceeded in as other cases of forfeited bonds in behalf of the state in said court: *Provided*, that the entry on said bond by the justice of the peace shall be *prima facie* evidence that the principal therein had been called and failed to answer: *Provided further*, that this act shall not be so construed as to authorize justices of the peace to take bond if the offence charged in the warrant be punishable with death. That nothing in this act shall be so construed as to prevent justices of the peace from remitting the penalty of the bond or the right of appeal from the justice of the peace to the superior court by the defendant or his security.

BOND WITH CONDITIONS.—A bond conditioned for the appearance of a defendant on a future day, signed and sealed by the parties, is good as a recognizance. Jones, 100—438.

A justice of the peace has no power to allow a party accused of an offence of which he has not final jurisdiction to give bail during the postponement of the examination. If any delay in the examination is necessary, the accused must be kept in the custody of the sheriff, or other officer of the law, until the examination is resumed. Jones, 100—438.

NOTE.—The above case was decided before the enactment of the above statute.

Sec. 330 (898). Jury to be allowed, if asked for. 1866-'9, c. 178, sub chap. 4, s. 9.

If either the complainant or the accused shall ask for it, the justice shall allow a trial by jury, as is provided in civil actions before justices of the peace.

Sec. 331 (899). What to be submitted to the jury. 1868-'9, c. 178, sub chap. 4, s. 10.

In case a trial by jury shall be had, the justice shall submit to the jury in each case simply the question of the guilt or innocence of the accused of the offence charged, and shall enter the verdict on his docket, and adjudge accordingly.

Sec. 332 (900). Accused may appeal; trial de novo in superior court. 1868-'9, c. 178, sub chap. 4, s. 11. 1879, c. 92, s. 10.

The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the

justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings.

SUPERIOR COURT NOT A COURT OF ERROR.—An appeal from a justice of the peace from his refusal to sustain a motion in arrest of judgment brings the whole case into the superior court, and defendant is there entitled to a trial *de novo*; but in such case the motion in arrest of judgment has no pertinency in the superior court, since it is not a court of errors, and the action must be there tried anew without any regard to what was done by the justice. Koonce, 108—752.

APPEAL BRINGS UP WHOLE CASE.—After appeal to the superior court from a judgment rendered by the mayor of a town in an indictment for a violation of a town ordinance "the appeal was withdrawn," and "by agreement" the case was remanded to the mayor for trial. Defendant then had the case transferred before a justice of the peace and was there again convicted by a jury, and from the refusal of the justice to sustain a motion in arrest of judgment he again appealed to the superior court: *Held*, that the appeal brought the whole case into the superior court to be tried *de novo* without reference to the motion in arrest of judgment, and the court still had power to "amend the warrant so as to recite the town ordinance on which it is based, and otherwise conform it to the facts found on the trial. Koonce, 108—752.

Sec. 333 (827). Filing dockets with clerks. C. C. P., s. 552.

Each justice of the peace, as often as he has filled his docket, shall file the same with the clerk of the superior court for his county.

Sec. 334 (828). Delivery of unfilled docket to successor. C. C. P., s. 553. 1885, c. 372.

When a vacancy exists, from any cause, in the office of a justice of the peace, whose docket is not filled, or when such justice goes out of office by expiration of his term, such former justice, if living, and his personal representative, if dead, shall deliver such docket, The Code, and other books furnished him as a justice of the peace, and all official papers to his successor, who is authorized to hear and determine any unfinished action on said docket, in the same manner as if such action had been originally brought before such successor.

Sec. 335 (829). Filing and delivery, how enforced. C. C. P., s. 554. 1885, c. 402.

The duty imposed on the justice, or his personal representative, by the two preceding sections may be enforced, on ten days' notice in writing to such justice or his representative, by attachment, and on failure to comply with the duties imposed by said sec-

tions said justice or his personal representative shall be guilty of a misdemeanor.

Sec. 336 (901). *Justice to transmit papers to clerk of appellate court; what his return to set forth.* 1868-'9, c. 178, sub chap. 4, s. 12.

In every case whether an appeal shall be prayed or not, the justice shall forthwith transmit to the clerk of the superior court of the county all papers in the case, together with a copy of his preliminary finding, of the verdict, if any, of his determination of the facts if there shall have been no trial by jury, and of the sentence, in which shall be set forth all the facts found by him, as well as his finding of those which were alleged in the complaint, and which were found by him not to be proved.

Sec. 337 (902). *Either party paying fees, entitled to copy of complaint and other papers.* 1868-'9, c. 178, sub chap. 4, s. 13.

He shall give to either party on request, and on payment of his lawful fee, a copy of the complaint and of his finding and sentence.

Sec. 338 (908). *Process, etc., not to be quashed for want of form.* R. C., c. 3, s. 1. R. C., c. 62, s. 22. R. S., c. 3, s. 1. 1794, c. 414, s. 16.

No process or other proceeding begun before a justice of the peace, whether in a civil or criminal action, shall be quashed or set aside, for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending, shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment.

AMENDMENT MUST NOT CHANGE NATURE OF OFFENCE.—A warrant issued by a justice of the peace may be amended in form and substance, but the amendment must not change the nature of the offence. Vaughan, 91—532.

A warrant for releasing impounded stock which charges that the act was unlawfully done, but fails to charge that it was "wilfully" done, may be amended. Crook, 91—536.

STATUTE CONSTITUTIONAL.—The provisions of this section are not in conflict with Const. N. C., art. 1, secs. 12, 13. Crook, 91—536.

WARRANT AIDED BY AFFIDAVIT.—Where a warrant issued by a justice is informal, it may be aided by the affidavit if it refers to it, and if the charge so made is still defective in form or substance, the court may allow proper amendments. Sykes, 104—694.

WARRANT NEED NOT CONCLUDE "AGAINST THE STATUTE."—It is not necessary that the warrant should conclude "against the form of the statute." Sykes, 104—694.

AMENDMENT AFTER VERDICT.—A justice's warrant for going on land after being forbidden may be amended in the superior court to charge that the

entry was "wilful and unlawful" and against "the peace and dignity of the state," even after verdict. Smith, 103—410.

STATE MAY BE MADE PLAINTIFF BY AMENDMENT.—A warrant for failure to work the road issued by a justice may be amended in the superior court by inserting the state as plaintiff instead of the overseer. Cauble, 70—62.

NO REVIEW.—The exercise of the power to amend a complaint by a justice is not reviewable. Taylor, 118—1262.

MAGISTRATE FROM WHOM REMOVED MAY AMEND.—It is not necessary that the amendment should have the concurrence of the magistrate who heard the cause. Norman, 110—484.

LIMIT OF POWER.—The power to amend is unrestricted save only that the nature of the offence must not be changed. Norman, 110—484.

A warrant can not be amended by striking out the offence charged and inserting a new and different offence. Taylor, 118—1262.

AFFIDAVIT AND WARRANT ONE.—The affidavit and warrant are one in contemplation of law if one is referred to by the other. Davis, 111—729.

AFFIDAVIT NOT RE-SWORN.—It is not necessary after amendment that the affidavit be re-sworn. Norman, 110—484.

There is no necessity, after the affidavit is amended, that it should be verified in its amended form. Davis, 111—729.

NOT RE-SERVED.—Where the warrant is amended it is not necessary that it be again served. Norman, 110—484.

Sec. 339 (1133). Duty of magistrate on complaint being made to him of the commission of a crime. 1868-'9, c. 178, sub chap. 3, s. 2.

Whenever complaint shall be made to any such magistrate, that a criminal offence has been committed within this state, or without this state and within the United States, and that a person charged therewith is in this state, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him.

Sec. 340 (1134). Duty of magistrate to issue his warrant for the arrest of the accused. 1868-'9, c. 178, sub chap. 3, s. 3.

If it shall appear from such examination that any criminal offence has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation, and commanding the officer to whom it shall be directed, forthwith to take the person accused of having committed such offence, and to bring him before a magistrate, to be dealt with according to law.

Sec. 341 (1135). Where warrant to run. 1868-'9, c. 178, sub chap. 3, s. 4.

Warrants issued by any justice of the supreme court or by any judge of the superior court, or of a criminal court, may be executed in any part of this state; warrants issued by a justice of the peace, or by the chief officer of any city or incorporated town, may be executed in any part of the county of such justice,

or in which such city or town is situated, and on any river, bay or sound forming the boundary between that and some other county, and not elsewhere, unless indorsed as prescribed in the section following.

Sec. 342 (1136). How warrants may be indorsed. 1868-'9, c. 178, sub chap. 3, s. 5.

If the person against whom any warrant granted by any such justice of the peace or chief officer of a city or town shall be issued, shall escape, or be in any other county out of the jurisdiction of such justice or chief officer, it shall be the duty of any justice of the peace, or any other magistrate named in this chapter within the county where such offender shall be, or shall be suspected to be, upon proof of the handwriting of the magistrate issuing the warrant, to endorse his name on the same, and thereupon the person, or officer to whom the warrant was directed, or any officer of the county in which it was indorsed, to whom it may be delivered, may arrest the offender in that county.

Sec. 343 (1137). Magistrate not liable to indictment or action for improperly indorsing warrant. 1868-'9, c. 178, sub chap. 3, s. 6.

No magistrate shall be liable to any indictment, action for trespass or other action for having indorsed any warrant pursuant to the provisions of the last section, although it should afterwards appear that such warrant was illegally or improperly issued.

Sec. 344 (1138). Person arrested to be taken before some magistrate of the county where offence was committed. 1868-'9, c. 178, sub chap. 3, s. 7.

It shall be the duty of the officer making the arrest to take the person charged with the offence before some magistrate of the county in which the offence is charged to have been committed, or before any judge of the supreme, superior or criminal court.

Sec. 345 (1133). Magistrate shall take bail, if the offence be not a capital one. 1868-'9, c. 178, sub chap. 3, s. 8. 1871-'2, c. 37, s. 1.

If the offence charged in the warrant be not punishable with death, such magistrate may take from the person so arrested a recognizance with sufficient sureties for his appearance at the next term of the court having jurisdiction, to be held in the county where the offence shall be alleged to have been committed.

Sec. 346 (1140). Duty of magistrate granting bail. 1868-'9, s. 178, sub chap. 3, s. 9.

Such magistrate shall certify on the warrant the fact of his having let the defendant to bail, and shall deliver the same, to-

gether with the recognizance taken by him, to the officer or other person having charge of the prisoner, who shall deliver the same without unnecessary delay to the clerk of the court in which such prisoner shall have been recognized to appear.

Sec. 347 (1141). If bail is not allowed, or is not given, the accused to be taken before a magistrate of the county where the warrant was issued. 1868-'9, c. 178, sub chap. 3, s. 10.

If such magistrate refuse to bail the person so arrested, or if such person fail to give bail as above provided, the officer or person having him in charge shall take him before a magistrate of the county in which the warrant was originally issued as hereinafter provided.

Sec. 348 (1142). In capital cases the prisoner must be brought before a magistrate of the county where the warrant was issued or before some judge of the supreme or superior court. 1868-'9, c. 178, sub chap. 3, s. 11.

If the offence charged in the warrant be punishable with death, the officer making the arrest shall convey the prisoner to the county where the warrant was originally issued, before some magistrate thereof, or before a judge of the supreme or superior court.

Sec. 349 (1143). Before what magistrate warrant to be returnable. 1868-'9, c. 178, sub chap. 3, s. 12.

Persons arrested under any warrant issued for any offence where no provision is otherwise made, shall be brought before the magistrate who issued the warrant; or, if he be absent, or from any cause unable to try the case, before the nearest magistrate in the same county; and the warrant, by virtue of which the arrest shall have been made, with a proper return indorsed thereon and signed by the officer or person making the arrest, shall be delivered to such magistrate.

Sec. 350 (1144). Duty of the examining magistrate. 1868-'9, c. 178, sub chap. 3, s. 13.

The magistrate, before whom any such person shall be brought, shall proceed, as soon as may be, to examine the complainant, and the witnesses produced in support of the prosecution, on oath, in the presence of the prisoner, in regard to the offence charged, and in regard to any other matters connected with such charge, which such magistrate may deem pertinent.

EVIDENCE OF OFFICIAL CAPACITY OF THE JUSTICE.—Where the record shows that, upon preliminary examination, the prisoner was brought before A. B. an acting justice or the peace, charged with an offence, it sufficiently appears that the justice was acting in his official capacity in conducting the inquiry. *Bridgers*, 87—562.

Sec. 351 (1145). The examination; prisoner to be allowed time to advise with counsel and to cross-examine witness against him. 1868-'9, c. 178, sub chap. 3, s. 14.

The magistrate shall then proceed to examine the prisoner in relation to the offence charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed of the charge made against him, and shall be allowed a reasonable time to send for and advise with counsel. If desired by the person arrested, his counsel shall be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution.

NAME OF PRISONER.—Evidence of the name of a prisoner as given by him when brought before the examining magistrate is admissible, though it does not appear whether the examination was reduced to writing or not. Johnson, 67—55.

Sec. 352 (1146). Prisoner shall be informed that he may refuse to answer any questions. 1868-'9, c. 178, sub chap. 3, s. 15.

At the commencement of the examination, the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings.

It is not necessary that the exact language of the statute should be used in giving the caution. The fact that defendant was "duly warned and told that he need not say anything unless he wanted to, and it would not be used against him if he did not testify, and it was dangerous to go on the stand," etc., is sufficient. DeGraff, 113—688.

It is not necessary that the committing magistrate at the commencement of the examination should use the very words of the statute, but it is sufficient if there be a substantial compliance and that the prisoner be informed in plain language of his rights. Rogers, 112—874.

Where a defendant is called by his counsel and sworn and examined as a witness he will be deemed to be exercising his right to testify under section 1353 of The Code, and he can not insist afterwards that he was not cautioned. Hawkins, 115—712.

Sec. 353 (1147). Answer of prisoner shall be reduced to writing. 1868-'9, c. 178, sub chap. 3, s. 16.

The answer of the prisoner to the several interrogatories shall be reduced to writing by the magistrate, or under his direction; they shall be read to the prisoner who may correct or add to them; and when made conformable to what he declares is the truth, shall be certified and signed by the magistrate.

SEAL.—It is not necessary that the examination should be certified under the private or official seal of the committing magistrate. Pressley, 90—780.

Sec. 354 (1148). Prisoner may examine witnesses and have the assistance of counsel. 1868-'9, c. 178, sub chap. 3, s. 17.

After the examination of the prisoner is complete, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination.

Sec. 355 (1149). The prisoner shall not be examined in the presence of witnesses; witnesses may be examined separately. 1868-'9, c. 178, sub chap. 3, s. 18.

The witnesses produced on the part either of the prisoner or of the prosecution shall not be present at the examination of the prisoner; and while any witness is under examination the magistrate may exclude from the place in which such examination is had all witnesses who have not been examined, and may cause the witnesses to be kept separate and prevented from conversing with each other until they shall have been examined.

Sec. 356 (1150). The testimony of witnesses to be reduced to writing. 1868-'9, c. 178, sub chap. 3, s. 19.

The evidence given by the several witnesses examined shall be reduced to writing by the magistrate or under his direction, and shall be signed by the witnesses respectively.

EXACT WORDS NOT REQUIRED.—The justice is not required to write down the very words of the witness, but may give the substance. *Bridgers*, 87—662.

WHEN EXAMINATION COMPETENT FOR DEFENDANT.—The written testimony of a witness taken before a committing magistrate is competent for the defendant if the witness is dead, or too ill to be present, or insane, or has removed from the state, at the instigation or with the connivance of the prosecutor. *King*, 86—603.

NOT COMPETENT.—Such evidence is not competent when the witness merely fails to respond to a subpoena, and is simply proved to have "run away," and there is no proof that any effort has been made to secure his presence. *King*, 86—603.

PAROL EVIDENCE COMPETENT, THOUGH EXAMINATION REDUCED TO WRITING.—A magistrate may state what a witness swore before him in regard to the crime charged, though he afterwards reduced the statement to writing. Such statement could only be referred to to refresh his memory. *Adair*, 66—298.

HOW WRITTEN EXAMINATION USED.—The testimony of a witness taken down by a magistrate can not be used in the superior court as evidence in chief, but may be used to show contradictory statements made by him. *McLeod*, 8 (1 *Hawks*), 344.

Where the purpose is to contradict a witness as to a material matter, the written examination of such witness, taken by a justice on the preliminary trial, is competent, and such witness need not be asked what he swore on the preliminary examination before offering such written evidence of contradictory statements. *Jordan*, 110—491.

The written testimony of a witness, whether signed or not, is competent to contradict such witness who testified to the contrary in the superior

court, but it can not be offered as substantive evidence. *Jordan*, 110—491.

Sec. 357 (1151). When prisoner shall be discharged. 1868-'9, c. 178, sub chap. 3, s. 20.

If, upon examination of the whole matter, it shall appear to the magistrate either that no offence has been committed by any person or that there is no probable cause for charging the prisoner therewith, he shall discharge such prisoner.

Sec. 358 (1152). When prisoner shall be bound over. 1868-'9, c. 178, sub chap. 3, s. 21.

If it shall appear that an offence has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, the magistrate shall bind by recognizances the prosecutor and all the material witnesses against such prisoner to appear and testify at the next term of the court having jurisdiction for the county in which the offence is alleged to have been committed.

Sec. 359 (1153). Magistrate need not take the examination of a prisoner charged with a misdemeanor. 1868-'9, c. 178, sub chap. 3, s. 22.

Nothing contained in the preceding sections of this chapter shall be construed to require any magistrate, before whom a prisoner charged with a misdemeanor shall be brought, to take the examination of such prisoner, except where such magistrate shall deem it material so to do, or where such examination shall be required by the prisoner.

Sec. 360 (1157). Examinations and recognizances to be certified to the court by the committing magistrate. 1868-'9, c. 178, sub chap. 3, s. 26.

All examinations and recognizances taken pursuant to the provisions of this chapter shall be certified by the magistrate taking the same to the court at which the witnesses are bound to appear, at the first day of the sitting thereof; and the examinations taken and subscribed as herein prescribed, may be used as evidence before the grand jury, and on the trial of the accused, provided he was present at the taking thereof and had an opportunity to hear the same and to cross-examine the deposing witness, if such witness be dead or so ill as not to be able to travel, or by procurement or connivance of the defendant, hath removed from the state or is of unsound mind.

Sec. 361 (1158). Penalty on magistrate failing to make the required return. 1868-'9, c. 178, sub chap. 3, s. 27.

If any magistrate shall refuse or neglect to return to the proper court any such examination or recognizance by him taken, he may

be compelled by rule of court forthwith to return the same, and in case of disobedience of such rule, may be proceeded against by attachment as for contempt of court as provided by law.

Sec. 362 (1159). The magistrate may associate with himself another. 1868-'9, c. 178, sub chap. 3, s. 28.

It shall be lawful for any magistrate, to whom any complaint may be made, or before whom any prisoner may be brought, as hereinbefore provided, to associate with himself any other magistrate of the same county; and the powers and duties herein mentioned may be executed by such two magistrates so associated.

COURT OF TWO JUSTICES CONSTITUTIONAL.—It is no objection to an indictment for perjury alleged to have been committed before two justices of the peace "acting and sitting together," that there is no such tribunal known to our constitution, since the above statute, which authorizes such a proceeding, is in pursuance of the provisions of the constitution, art. 4, sec. 12, which empowers the legislature to "allot and distribute" the judicial power and jurisdiction which does not pertain to the supreme court "in such manner as they may deem best. Flowers, 109—.

Sec. 363 (1216). Officers who are authorized to keep the peace. 1868-'9, c. 178, sub chap. 2, s. 1.

The following magistrates shall have power to cause to be kept all the laws made for the preservation of the public peace, and in execution of that power to require persons to give security to keep the peace, in the manner provided in this chapter, namely: The chief justice and associate justices of the supreme court, the judges of the superior and criminal courts, and of any special courts which may be hereafter created, the justices of the peace, the mayors or other chief officers of all cities and towns.

Sec. 364 (1217). Duty of magistrate on complaint being made. 1868-'9, c. 178, sub chap. 2, s. 2.

Whenever complaint shall be made in writing, and upon oath to any such magistrate that any person has threatened to commit any offence against the person or property of another, it shall be the duty of such magistrate to examine such complainant and any witnesses who may be produced, on oath, to reduce such examination to writing, and to cause the same to be subscribed by the parties so examined.

Sec. 365 (1218). When warrant to issue. 1868-'9, c. 178, sub chap. 2, s. 3.

If it shall appear from such examination that there is just reason to fear the commission of any such offence by the person complained of, it shall be the duty of the magistrate to issue a warrant under his hand, with or without seal, reciting the complaint, and

commanding the officer to whom it is directed forthwith to apprehend the person so complained of, and bring him before such magistrate or some other magistrate authorized to issue such warrant.

Sec. 366 (1219). To whom the warrant shall be directed. 1868-'9, c. 178, sub chap. 2, s. 4.

The warrant shall be directed to the sheriff, coroner or any constable, each of whom shall have power to execute the same within his county; and if no sheriff, coroner or constable can conveniently be found, the warrant may be directed to any person whatever, who shall have power to execute the same within the county in which it is issued. No justice of the peace, or mayor, or other chief officer of any city or town shall direct his warrant to any officer outside of the county of said justice or chief officer.

Sec. 367 (1178). Criminal proceedings to issue and be returnable at any time; proceedings as heretofore. R. C., c. 35, s. 9. 1777, c. 115, s. 15.

All process, warrants and precepts, issued by any judge or justice of the peace, or clerk of any court, on any criminal prosecution, may issue at any time, and be made returnable to any day of the term of the court, to which such warrant, process, or precept is returnable.

INDICTMENTS AGAINST JUSTICES OF THE PEACE.—Defendant, upon affidavit made by the prosecutor in a certain case for forcible trespass, issued a warrant against the persons therein named as defendants, and upon the hearing bound such persons over to the next term of the superior court, and subsequent to the said term of the superior court, defendant issued another warrant upon the same affidavit against the same parties for the same offence: *Held*, that an instruction that if the jury believed defendant used his official position for the purpose of wrong and oppression, he was guilty, was correct. *Sneed*, 84—816.

In such case it was not error to refuse to charge that the evidence of one witness that he did not make a certain affidavit was not sufficient to contradict the fact recited in the justice's warrant issued upon such affidavit. *Ib.*

WHAT NECESSARY TO MAINTAIN INDICTMENT.—To maintain a criminal action against a justice of the peace it must be alleged and shown that he acted without his jurisdiction, or corruptly and with a criminal intent, or at least maliciously and without probable cause. *Ferguson*, 67—219.

FACTS MUST BE SET OUT.—An indictment against a justice of the peace for corruption in office must not only allege that the act was done corruptly, but must also set out the facts in which the corruption consists. *Zachary*, 44 (*Busb.*), 432.

REQUISITES FOR INDICTMENT FOR REFUSAL TO ISSUE WARRANT.—An indictment against a justice of the peace for refusing to issue his warrant for the arrest of a felon must allege either that the felony was committed in his presence, or the tender to him of an affidavit of its commission, and that the felon was in the magistrate's county when the refusal took place. *Leigh*, 20 (3 D. & B.), 127.

JUSTICE'S COURT NOT A COURT OF RECORD.—The court of a justice of the peace is not a court of record, and the rules of evidence established for the proof and authentication of the proceedings of courts of record do not apply to such courts. Green, 100—419.

LANDLORD AND TENANT.

Sec. 368 (1754). Possession of crops deemed vested in lessors; preference of lessor's lien. 1876-'7, c. 283, s. 1.

When lands shall be rented or leased by agreement, written or oral, for agricultural purposes, or shall be cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands shall be paid and until all the stipulations contained in the lease or agreement shall be performed, or damages in lieu thereof shall be paid to the lessor or his assigns, and until said party or his assigns shall be paid for all advancements made and expenses incurred in making and saving said crops. This lien shall be preferred to all other liens, and the lessor or his assigns shall be entitled against the lessee or cropper or the assigns of either who shall remove the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

Sec. 369 (1759). Removal of crop by lessee without notice, a misdemeanor; unlawful seizure by landlord, a misdemeanor. 1876-'7, c. 283, s. 6. 1883, c. 83.

Any lessee or cropper, or the assigns of either, or any other person, who shall remove said crop, or any part thereof, from such land without the consent of the lessor or his assigns, and without giving him or his agent five days' notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns, on said crop, shall be guilty of a misdemeanor, and if any landlord shall unlawfully, wilfully, knowingly and without process of law, and unjustly seize the crop of his tenant when there is nothing due him, he shall be guilty of a misdemeanor.

WHAT CONSTITUTES A SEIZURE OF THE CROP.—It is not essential that the landlord should take forcible or even manual possession of the crop, but the offence will be complete if he exercises that possession or control

which prevents the tenant from gathering and removing his crop in a peaceable manner. Ewing, 108—755.

INDICTMENT.—An indictment charging defendant with the removal of a crop "without satisfying all liens on said crop," is fatally defective. Merritt, 89—506.

An indictment charging defendant with removing the crop "without satisfying all liens on said crop," is defective. Rose, 90—712.

An averment that defendant removed the crop "without having given *any* notice," is sufficient. Powell, 94—920.

An indictment which charges the lease and relation of landlord and tenant is sufficient without an averment that the landlord had a lien on the crop, since the statute implies the lien arising by virtue of the relation charged. Davis, *J., dissenting*. Smith, 106—653.

VARIANCE.—Where the indictment charges the defendant with the removal of a crop produced on the land in 1884, under a lease made November 1st, 1883, for one year, and the proof is that the crop was produced under a lease made in March, 1883, *for that year*, the variance is fatal. Ray, 92—810.

Where the indictment charges an agreement to raise a crop on the lands of G and the proof shows the title to be in another who rented the lands to G, there is no variance. Foushee, 117—766.

WHEN LESSOR INDICTABLE.—The lessor himself is indictable under this statute for removing the crop or any part thereof when he has previously conveyed his interest in the same to a third party. Rose, 90—712.

WHAT CONSTITUTES ONE A CROPPER AND NOT A TENANT.—An agreement by him who cultivates land that the owner who advances guano and seed-wheat shall, out of the crop, be repaid in wheat for such advancements, constitutes the former a cropper and not a tenant. Burwell, 63—661.

INTENT.—A tenant who, without the consent of, or notice to his landlord, and before satisfying all liens held by the lessor or his assigns, removes a portion of the crop from the land on which it was produced, is guilty, though the removal was only for the purpose of sheltering and protecting the crop on the tenant's own land. Williams, 106—646.

CHARGE.—An instruction that defendant must pay for the rent and supplies, and he must give the five days' notice, and if he failed to do "*either of these things*" he would be guilty, is erroneous, since if he gave the notice and the landlord failed to enforce his lien, then it is not indictable to remove the crop. Crowder, 97—432.

PUNISHMENT.—Punishment for unlawfully removing a crop by imprisonment in the penitentiary for two years, is illegal and unauthorized, though the evidence shows that the removal was in the night time. Powell, 94—920.

Sec. 370 (1760). Misdemeanor for tenant or lessee to surrender possession to other person than landlord. 1883, c. 138.

Any tenant or lessee of lands who shall wilfully, wrongfully and with intent to defraud the landlord or lessor, give up the possession of the rented or leased premises to any person other than his landlord or lessor, shall be guilty of a misdemeanor, and fined or imprisoned, or both, at the discretion of the court.

Sec. 371 (1761). Unlawful for tenant to injure house, fruit trees, etc., of landlord, 1883, c. 224.

Any tenant who shall, during his term or after its expiration, wilfully and unlawfully demolish, destroy, deface, injure or damage any tenement house, uninhabited house or other outhouse belonging to his landlord or upon his premises by removing parts thereof or by burning, or in any other manner, or shall unlawfully and wilfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure or any part thereof, built or standing upon the premises of such landlord, or shall wilfully and unlawfully cut down or destroy any fruit, shade or ornamental tree belonging to said landlord, shall be guilty of a misdemeanor, and fined or imprisoned or both, at the discretion of the court.

WINDOW SASHES PLACED IN HOUSE BY TENANT.—A tenant who, on giving up possession, removes the window sashes which he has placed in the house under a claim that they belong to him, can not be convicted under this statute. Overruling *State v. Whitener*, 92—798. *Whitener*, 93—590.

Sec. 372 (1762). This chapter to apply to lease of turpentine trees. 1876-'7, c. 283, s. 7. 193, c. 517.

This chapter shall apply to all leases or contracts to lease turpentine trees, or use lightwood for purposes of making tar, and the parties thereto shall be subject to the provisions and penalties of this chapter.

Sec. 373 (1763). Lessors for mining purposes and for getting timber entitled to the remedies given in this chapter. 1868-'9, c. 156, s. 16.

If, in a lease of land for mining, or of timbered land for the purpose of manufacturing the timber into goods, rent shall be reserved, and if it shall be agreed in the lease that the minerals, timber or goods, or any portion thereof shall not be removed until the payment of the rent, in such case the lessor shall have the rights and be entitled to the remedy given by this chapter.

LANDMARKS.

Sec. 374 (1063). Landmarks, penalty for altering or removing. 1858-'9, c. 17.

If any person shall wilfully or fraudulently remove, alter or deface any landmark, in anywise whatsoever, such person shall be guilty of a misdemeanor: *Provided*, that this section shall not

apply to such landmarks as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels.

Where the charge itself is of such a nature that the formal statement of it is equivalent in meaning to negating the proviso, the reason for the rule requiring that a proviso contained in the same section of the law in which the offence is defined must be negated ceases, and such a case constitutes an exception to it. Bryant, 111—693.

Where the allegation is that the landmark removed was a corner tree it is unnecessary and useless to add that it was not a creek or stream "which the interest of agriculture might require to be altered or turned from their channels." Bryant, 111—693.

An indictment that defendant did alter, deface and remove a certain landmark, to-wit: a corner tree, is good without a negative averment of the matter contained in the proviso of the statute. Bryant, 111—693.

LARCENY.

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1. WHAT CONSTITUTES LARCENY.

The prosecutor took a bucket of peas to market, and having occasion to go some distance to enquire the price of peas, set the bucket down in a cart which he mistook for that of a friend. The owner of the cart returning to it, placed the bucket on the ground, and afterwards being about to leave, raised it up and asked, "Whose are they?" whereupon defendant, a retailer of vegetables, came up and took it, the owner of the cart yielding it and saying, "You must give it up to the owner when he comes and calls for it." Afterwards the prosecutor found defendant with the bucket, beets and lettuce having been placed on the peas, and defendant manifested insolence and unwillingness to surrender it: *Held*,

that there was evidence from which the jury might infer every ingredient of larceny. *Farrow*, 61 (Phil. Law), 161.

The prosecutor being drunk and partially paralyzed and having a belt of money around his body, was sitting with his head bent down and alone with defendant in his bar-room, when the latter gently removed the belt and money from the prosecutor's body, upon which the prosecutor raised his head and seeing the belt in defendant's hand, asked him to give back his money, to which he replied "No, I'll keep it," and afterwards, upon the prosecutor stepping out for a moment, the defendant refused to let him come in again, and never returned his belt or money: *Held*, that these facts tended to prove a larceny of the belt and money, and that it was proper to leave the case to the jury. *Jackson*, 65—305.

While the prosecutor and defendant were examining a bank-note which defendant had produced, the prosecutor felt defendant's hand in his pocket on his pocket-book, and immediately seized his arm, defendant at the same time snatching the bill; a scuffle ensued in which the prosecutor was thrown down, and the defendant escaped with the pocket-book and bank-note: *Held*, not to be robbery, but larceny. *John*, 50 (5 Jones), 163.

The prosecutor lost a carpet-bag on the highway and directed one to get it for him who did so as his bailee, but concealed the article and denied having found it: *Held*, that this was but a breach of bailment and not larceny. *England*, 53 (8 Jones), 399.

2. ARTIFICE—FRAUD.

FRAUD, TRICK, ARTIFICE.—Defendant gave the prosecutor his note, with sureties, for the price of land sold him by the prosecutor, but afterwards complained to the prosecutor that the title to the land was not good. Subsequently he proposed to pay the note in cotton, which being declined, he asked to see the note, saying he *wanted to see what sort of currency it was payable in*, and being at first refused, he insisted until at last they went to the house, defendant sitting down on the outside, and the prosecutor brought out the note and showed it to defendant, who took it saying, "Now I have got it, and you won't get it again." The prosecutor demanded it back and seized his hand, but defendant broke loose and seized an axe and held it until he reached his horse, and then rode away with the note, saying that one of the sureties had sent him word to get the note as he could or might. The court charged that if defendant went to the prosecutor's house with a felonious purpose to get possession of the note, and resorted to a fraudulent trick or device to effect that purpose, he was guilty of larceny: *Held*, that the facts do not make out a case of larceny. *Rodman, J., dissenting*, says that the open manner of the taking was only a circumstance tending as matter of evidence to negative a felonious intent, but subject to be outweighed by other circumstances in evidence, and that there was no error in the instructions. *Deal*, 64—270.

Artifice in getting possession of a thing is to be distinguished from *artifice in concealing the fact that the taker has it in possession*; it is the latter that shows a *felonious intent*. *Deal*, 64—270.

While it is ordinarily true that a person is not guilty of larceny who converts property in his own possession, yet if he gained such possession by any trick or fraud, with intent at the time to convert, he may be found guilty of larceny. *MacRae*, 111—665.

3. THE INTENT.

A felonious intent can not be presumed from the undisputed evidence of the state. The plea of not guilty denies its credibility, and the presumption of innocence can be overcome only by the verdict of a jury. Coy, 119—901.

Defendant took money from a drawer in a bar-room in the presence of three persons, one of whom testified that he saw defendant take something from the drawer, and that afterwards defendant showed him some money, and said that R, who was the proprietor of the bar, told him to *try C*, who was keeper of the bar: *Held*, that defendant was entitled to have the question submitted to the jury whether he took the money *feloniously* or to *try* the bar-keeper. Ledford, 67—60.

It is error for the court to charge that the jury must find that defendant took the property alleged to have been stolen "with felonious intent," and that "the question of intent had been fully discussed by counsel, and it was a question for them to decide," without explaining to the jury what is meant by a felonious intent. Gaither, 72—458.

A charge which fails to submit the question of felonious intent to the jury is fatally defective. Barrett, 123—753.

SPECIAL VERDICT.—A special verdict on indictment for larceny must find the *intent* as a fact, not simply evidence from which the intent may be inferred. Bray, 89—480.

4. THE TAKING IN OWNER'S PRESENCE.

Where the offence was committed in the known presence of the owner of the property, and defendant claims that his offence was only a forcible trespass, it is error to refuse to submit the question of a felonious intent to the jury. Coy, 119—901.

Defendant picked up some money which the prosecutor dropped while counting it, and when asked for it answered: "Oh, hell! You ain't going to get this money." The prosecutor started toward defendant and defendant put his hand to his breast and threatened to kill the prosecutor if he followed him: *Held*, that it was proper to submit the question of a felonious intent to the jury. Powell, 103—424.

Where the evidence is that defendant gave the prosecutor drugged liquor which made him almost immediately "as limber as a dish-rag," and that defendant then put his hand in the prosecutor's pocket and took his money, the prosecutor saying "Don't take my money," a request to charge that in order to constitute larceny the felonious taking must not only be fraudulently and secretly done, but must also leave the prosecutor without knowledge of the taker, is properly refused, since the word "secretly" in such case is calculated to mislead the jury, and larceny may be committed without secrecy in a certain sense, or it may be done in daylight, or in a crowd. Approving *State v. Jackson*, 45—305. Buckley, 72—358.

5. BORROWED PROPERTY.

If A borrow a horse from B with the felonious intent to deprive B of it, and to appropriate it to his own use, and does so, A is guilty of larceny; but if A borrowed of B twenty dollars with the same intent, it is not larceny but fraud, since in lending the horse the owner expected the return of the same horse and did not part with the *title*, but in lending the money the owner parted with the title and did not expect a return of the same money. Bryant, 75—124.

Defendant borrowed a horse of the owner to ride about a mile, and was directed by the owner to hitch the horse on coming back in a different place to that from which he was taken; but defendant on returning, hitched the horse in another place behind a grocery, and afterwards rode him off and never returned him: *Held*, that it was not error to instruct the jury that if they believed the defendant borrowed the horse with an intention existing at the time to steal him, or if, after returning him, he afterwards took and carried him off without the owner's knowledge or consent, he was guilty of larceny. *Scott*, 64—586.

Where one borrows property with a fraudulent intent not to return it, he is guilty of larceny. *Long*, 2 (1 Hay.), 154 (177).

One who borrows a horse, with the intention, existing at the time, of stealing him, is guilty of larceny, and no change of mind after such taking will purge the offence. *Scott*, 64—586.

6. PROPERTY LOST AND FOUND.

Where a carpet-bag is lost on a public highway, and the owner directs another to get it for him, and he does so, but afterwards conceals the article and denies having found it, the finder is the bailee of the owner, and can not be convicted of larceny. *England*, 53 (8 Jones), 399.

Where a shawl was dropped in an exhibition room, and picked up by the defendant and placed in a conspicuous place and afterwards appropriated to his own use, he is not guilty of larceny. *Roper*, 14 (3 Dev.), 473.

To constitute larceny there must be an original felonious intent, general or special, in the mind of the accused, at the time of taking or finding lost property, otherwise it is a trespass and not a felony. *Arkle*, 116—1017.

The omission to use the ordinary means of discovering the owner of property lost and found raises a presumption of fraudulent intent against the finder, which it is necessary for him to explain and obviate, and this is done by showing that he endeavored to find the owner, or that he openly made known the finding so as to make himself responsible to the owner. *Arkle*, 116—1017.

It appeared that defendant while away from home received a pocket-book containing money, bank certificates and a check payable to the prosecuting witness, from his wife who found it, defendant not having been present when it was found by his wife. The day after he returned home he wrote to the bank which issued the certificate for the name of the owner. There was some delay in returning the property caused by a feeling engendered by correspondence with the owner, to whom defendant explained the whole matter, and by defendant's demand for a reward: *Held*, error to submit the case to the jury. *Arkle*, 116—1017.

7. PROPERTY LAWFULLY OBTAINED.

If defendant obtained possession of the property lawfully, and, after getting possession, he then made up his mind to convert it to his own use, he would not be guilty. *Hayes*, 111—727.

Defendant purchased a horse on condition that the title was not to pass until the price was paid; failing to pay the vendor recovered the horse, and afterwards defendant, in the night, secretly took the horse from the vendor's stables, and carried it away in a manner indicating a felonious purpose: *Held*, that a charge that defendant would be guilty if the taking was not under a *bona fide* belief that he had the property or an interest in the horse, was not erroneous. *Thompson*, 95—596.

A charge that if defendant got possession of the property under a contract of purchase he was not guilty is not a response to a prayer of defendant that if he came into possession lawfully, and afterwards made up his mind to convert the property to his own use he would not be guilty. This view of the case defendant was entitled to have presented to the jury. *Hayes*, 111—727.

8. TAKING BY CONSENT OF OWNER.

Larceny can not be committed when the owner, through his agent, consents to the taking and asportation, though such consent is given for the purpose of apprehending the felon. *Adams*, 115—775.

Where one forms the intent to steal and carries out such design he is guilty of larceny, notwithstanding the owner of the property is advised of the intended larceny, appoints agents to watch him, and, with a view of having him subsequently punished, does not prevent the commission of the theft. *Adams*, 115—775.

Although the intent to steal is formed and carried out the perpetrator is not guilty if he has been persuaded to commit the theft by a servant of the owner at the owner's instance. *Adams*, 115—775.

Larceny can not be committed unless the property be taken against the will of the owner, the object of the law being to prevent larceny by punishing it, and not to procure the commission of the crime in order that the offender may be punished. *Adams*, 115—775.

9. SECRECY.

Secrecy is not such an essential element of larceny as to require the state, in every instance, to prove an attempt to conceal the taking. *Hill*, 114—780.

Where there is no secrecy, but an open taking, without force or stratagem, such circumstances go far toward negating a felonious intent; and strong evidence, therefore, is necessary to sustain a conviction. *Powell*, 103—424.

Larceny may be committed in a crowd, or in the public streets. *Fisher*, 70—78.

It is not true, as a general proposition, that there can be no felonious intent where the taking is done openly and there is no effort to conceal. *Powell*, 103—424.

10. THE CORPUS DELICTI.

A person may be convicted of larceny upon evidence connecting him with the theft, though the articles stolen may not be identified or found. *Kent*, 65—311.

11. SUBJECTS OF LARCENY.

TURKEYS.—Turkeys are domestic fowls, and an indictment for stealing one need not allege that it was *tame*. *Turner*, 66—618.

OTTER CONFINED IN TRAP.—An otter confined in a trap or dead may be the subject of larceny, since it is an animal valuable for its fur. *House*, 65—315.

NUGGET OF GOLD.—A nugget of gold separated from the vein by natural causes and lying on a rock pile, savors of the reality, and is not the subject

of larceny where the taking and carrying away is one continuous act. Burt, 64—619.

TURPENTINE IN THE TREES.—Turpentine which has run out of the trees into boxes cut in the tree for the purpose of receiving the liquid, is the subject of larceny. Moore, 33 (11 Ired.), 70.

Turpentine in boxes in the trees, ready to be dipped, is personal property, and may be the subject of larceny. King, 98—648.

DOGS.—Dogs are not the subject of larceny in this state. Holder, 81—527.

MUST HAVE VALUE.—A thing destitute of both intrinsic and artificial value, as "one-half ten shilling bill of the currency of the state," is not the subject of larceny. Bryant, 4 (2 Car. L. R.), 269 (249).

FISH.—Fish are not the subject of larceny unless reclaimed, confined or dead and valuable for food or otherwise. Krider, 78—481.

THE CRITERION.—On indictment for the larceny of wild animals the true criterion as to whether they are the subjects of larceny is the *value* of the animal, whether for food, or otherwise. House, 65—315.

12. LESSEE OF CROP.

An indictment for larceny will lie against a lessee or cropper for secretly appropriating the crop to his own use when the crop has been harvested and stored by the landlord in a house on the premises and the door locked and the key kept by him, though there has been no division of the crop. Such facts show a trespass on the landlord's possession, and defendant is guilty notwithstanding his interest in the property. Webb, 87—558.

A lessee or cropper who, while hauling undivided cotton to the gin, throws some of it off by the roadside in a sack, and returns at night and gets it, is not guilty of larceny of the cotton. Copeland, 86—691.

Where a person gets staves on the land of another under a contract that he is to have half of them for making them, while they remain on the land undivided, he is neither a tenant in common with the owner of the land nor a bailee of them, and he, or any other person with his connivance, may be convicted of larceny in taking them. Jones, 19 (2 D. & B.), 545.

An indictment against a tenant for the larceny of crops raised by him which lays the property in the landlord and tenant as their joint and undivided property, can not be sustained. McCoy, 89—466.

13. RECENT POSSESSION.

The fact that tobacco stolen on Sunday night was found in defendant's barn on Tuesday is some evidence of his guilt, and requires an explanation from him as to how he became possessed of the stolen article. Williams, 47 (2 Jones), 194.

A recent possession of stolen property raises a reasonable presumption of guilt, and throws the burden on defendant to account for his possession. Jones, 20 (3 D. & B.), 122.

The finding of stolen goods in the possession of defendant a week or two after the theft raises a presumption of fact, not of *law*, against him, and is but a circumstance for the jury to consider, the rule being that the evidence is stronger or weaker as the possession is more or less recent. Rights, 82—675.

The presumption that he who is found in possession of stolen goods recently after the theft was committed is himself the thief, applies *only* when this possession is of a kind which manifests that the stolen goods have come to the possessor *by his own act*, or at all events *with his undoubted concurrence*. Smith, 24 (2 Ired.), 402.

Stolen property found in a house occupied exclusively by defendant and his wife is found in defendant's possession, and such possession is evidence tending to prove defendant's guilt. Johnson, 60 (Winst. Law), 238.

A person found in possession of goods recently stolen is presumed in law to be the thief, and it is not necessary for the state to show that any other suspicious circumstance accompanies such possession. Turner, 65—592.

The fact that a coat stolen from a store in January, 1881, was found in defendant's possession in August, 1882, and that defendant lived in the town in which the store was located, and was often in the store, is insufficient to warrant a verdict of guilty. Jennett, 88—665.

Two days after the larceny was committed, the stolen goods were found in an uninhabited house half a mile from where defendant lived, in which the former occupant had left some turnips; at 1 o'clock at night of the same day defendant and a woman went to the house, he going in at a window and she remaining on the outside, and when certain persons who were watching the house approached, the woman ran off, and defendant being ordered to come out did so after some delay: *Held*, that the evidence did not warrant a conviction. Rice, 83—661.

An instruction that, if the stolen coin was sent by defendant two days after the theft to a bank where it was found and identified by the owner, the law presumed the defendant to be the thief and the jury should convict, unless defendant should satisfactorily explain the possession, was erroneous. McRae, 120—608.

Where the defendant is found in the possession of stolen goods *immediately* after the larceny, it is a *violent* presumption of his having stolen them, and the court should instruct the jury that, *in law*, he is guilty. Jennett, 88—665.

Where a person is found in possession of goods which have recently been stolen, there is a presumption of law that he is guilty of the theft, and it is not necessary, in order to convict him, for the state to show that any other suspicious circumstance accompanied such possession. Turner, 65—592.

A person found in possession of stolen goods so soon after the theft that he could not reasonably have gotten the possession unless he had stolen them himself, is presumed in law to be the thief. Graves, 72—482.

Possession of stolen goods some time after the larceny raises a *probable* presumption of guilt, and the question must be submitted to the jury. Jennett, 88—665.

Where the defendant is not found in possession of the stolen property recently after the larceny, it is a *light* or *rash* presumption, and not sufficient to warrant conviction, unless the attending circumstances tend to implicate the defendant in the larceny, as where he makes false statements in respect to his possession. Jennett, 88—665.

The presumption of guilt that the law raises from recent possession of stolen property is strong, slight or weak, according to the particular facts surrounding a given case. McRae, 120—608.

14. ASPORTATION.

Evidence that defendant shot down a hog, cut off its ears, and skinned one of its hams without severing the skin from the body, is not sufficient to show asportation. *Alexander*, 75—232.

An indictment at common law for stealing a cow is not supported by evidence that the cow was shot down and her ears cut off by defendant, since merely shooting the cow down and cutting off her ears is not sufficient asportation. *Butler*, 65—309.

The turning of a barrel of turpentine, which was standing on its head, over on its side, with a felonious intent, is not such an asportation as will constitute larceny. *Jones*, 65—395.

Throwing wheat from one garner in a mill over into another is sufficient asportation to constitute larceny. *Cralge*, 89—475.

The removal of a drawer containing money from a safe, and a handling of the same at the door of the safe, without taking the money from the drawer, is sufficient asportation. *Green*, 81—560.

The removal of property from a store on the street to the sidewalk is sufficient asportation. *Mitchener*, 98—689.

A witness swore he saw defendant shoot down the cow alleged to have been stolen and then go to it and stoop down, and that about three months afterwards he pointed out the place to the owner of the cow. The owner testified that at that time there were no remains of the carcass to be found at the place where the killing had been done: *Held*, that an instruction that the fact that no remains of the carcass could be found at the place of killing three months thereafter was evidence sufficient to warrant them in finding an asportation, was erroneous, though there was other evidence which, if it had been properly submitted and believed, would have proved that fact. *Perkins*, 104—710.

15. ARTICLES STOLEN AT DIFFERENT TIMES.

SEVERAL ARTICLES STOLEN AT DIFFERENT TIMES.—Where several articles are stolen at the same time, or in the progress of a series of acts, so connected and continued that they form but one transaction, but one larceny is committed, and an acquittal or conviction upon an indictment charging one, or only a portion, of the articles, will be a good bar to a prosecution for the remainder. *Weaver*, 104—758.

Where the indictment contains only one count charging the stealing of several articles, and the proof shows only one transaction, the state can not be required to elect, but the jury may convict for the taking of one or all the articles alleged to have been stolen. *Bishop*, 98—773.

On proof that the articles alleged to have been stolen were taken from the prosecutor's store at different times, a request for an instruction that the several takings constituted different offences which can not be united in the same indictment, is properly refused, since there was a continuing transaction, and, in such cases, though there are several distinct asportations, the thief may be indicted for the final carrying away. *Morton*, 82—672.

On proof that the articles alleged to have been stolen were taken from the prosecutor's store at different times, a request for an instruction that the several takings constituted different offences which can not be united in the same indictment, is properly refused, since there was but a continuing transaction, and in such cases, though there be several distinct asportations, the parties may be indicted for the final carrying away. *Martin*, 82—672.

16. EVIDENCE.

EVIDENCE.—The evidence was that the prosecutor, while in a drunken condition, took out his pocket-book containing \$35, opened it, and handed defendant a quarter to pay for whiskey, defendant saying he had no money; that after drinking until the prosecutor was drunk they went on the road together, but after going some distance the prosecutor's consciousness returned, when he found himself down and defendant on his mule, and feeling for his pocket-book he found it gone. He told defendant of his loss, and defendant went back to hunt for it. Next day defendant returned to town, got drunk and showed "a wad of bills of money," and said he had "a plenty." *Held*, that the evidence was sufficient to warrant a verdict of guilty. *Wilson*, 76—120.

Evidence that a third person, who resided on defendant's premises, when he saw the prosecutor approaching the premises on the day after the larceny was committed, hurried off and changed his shoes, that he stated afterwards that he put the tobacco alleged to have been stolen in the granary, and that he fled the country a few days afterwards, is inadmissible. *White*, 68—158.

After proof that stolen cotton was found in defendant's barn loft covered with a quilt, a witness for defendant who had not heard the other testimony, testified that about the time the cotton was stolen she was requested by defendant's wife to hide some cotton for her so that her husband could not get it, and that she covered the cotton with a quilt in the loft of the house, and that she did not go to the barn at all: *Held*, that it was error for the court, after calling attention to the discrepancy between the testimony of defendant's witness and that of the other witnesses, to charge the jury that "when a defendant puts a witness on the stand it was a declaration on his part that the witness was a truthful one," and that if the jury were satisfied that the testimony of this witness was false, and defendant knew it to be false, then it was a circumstance tending to establish his guilt. *Brown*, 76—222.

Where two persons are jointly indicted for larceny, one of them may introduce witnesses to prove the confessions of the other that he alone is guilty. *Brite*, 73—26.

Where the property is laid in a corporation, it is not necessary to produce the charter; evidence that the corporation carries on business as such is sufficient. *Grant*, 104—908.

The evidence was that lint cotton was stolen from certain bales on the platform of a warehouse; that on the night of the larceny four bags containing cotton like that stolen were found near by, two of them hidden; that defendant on the same night was seen near the warehouse behind some wood, and that about a month afterwards two bags containing lint cotton similar in all respects to the bags found near the warehouse were found concealed in defendant's possession: *Held*, that the evidence warranted a verdict of guilty. *Ratterson*, 78—470.

Where the indictment charges the stealing of "one National Bank note of the denomination of five dollars of the value of five dollars, one treasury note of the denomination of five dollars of the value of five dollars," evidence that defendant stole one or the other of such notes, the witness being unable to say which, will not justify a verdict of guilty. *Collins*, 72—144.

Evidence, in such case, that the witness *believed* it was a National Bank note will support a verdict of guilty. *Distinguishing State v. Collins*, above quoted. *Freeman*, 72—521.

Evidence that pork stolen from a warehouse was found soon after in

the river; that defendant told witness that a certain man had thrown some pork overboard into the river, and that defendant said to witness "Let us go down and get it," and that defendant and witness searched for the pork with poles a few minutes near where the pork was found, but for some reason both desisted and left, is not sufficient to be left to the jury. James, 90—702.

Where defendant testifies that he sent his wife to a person to borrow money with which he paid for the property alleged to have been stolen, the state may prove what the wife said to such person when she got the money as to the purpose it was intended to serve. Lemon, 92—790.

Evidence that defendant while in jail sent a messenger to the prosecutor "to find out if he would allow the defendant to take thirty-nine lashes and turn him loose," is admissible. DeBerry, 92—800.

Where, on the question of identity, a policeman, who has been contradicted by defendant and his witnesses, testifies that he saw defendant in the prosecutor's store, and gives a description of defendant's appearance and dress, and that he went and told the prosecutor, it is competent for the state to prove by the witness what he told the prosecutor in regard to defendant's appearance and dress. Whitfield, 92—831.

On indictment for the larceny of a horse, there was evidence that defendant lived near the prosecutor; that he and one S were seen in the neighborhood the day previous; that tracks leading from the stable accompanied by those of one person joined the tracks of another and a mule near by; next day the horse and mule were seen in the possession of S some twenty miles away, where defendant joined him and assisted in conveying the mule and horse to a distant point without making any inquiry as to where the horse and mule were obtained: *Held*, that the evidence was sufficient to be submitted to the jury. Goings, 101—706.

The evidence, on indictment for larceny, tended to show that money was missing from a bureau drawer in a bed-chamber; that the servants of the family had access to the chamber; that defendant had been employed about the house, and knew where the money was kept; that upon one occasion he was discovered in another room behind the door in such a position that he could see the door of the room where the money was, and on being discovered said he had come to get the balance due him for work, when in fact there was nothing due him, and that a key was found on his person which would unlock the money drawer: *Held*, that there was sufficient evidence to be submitted to the jury on the intent with which defendant entered the house. Christmas, 101—749.

On trial for the larceny of cotton, there was evidence that defendants had knowledge of the cotton, that both of them worked about it shortly before it was missed, and one of them weighed and marked the bales. Defendants were discharged by their employer, and shortly afterwards one of them, in the immediate neighborhood, and about nine o'clock in the night, asked a witness who had a cart if he wanted to make some money, and, on receiving an affirmative reply, said he wanted some cotton moved. The witness asked where, and he replied "Up here," pointing toward the platform where the cotton was, and said he had two bales, half the number missed. Witness replied that he could not afford to get himself into trouble, and to this the defendant made no reply. After the disappearance of the cotton had been talked about in the community, defendant said to another witness, "W," the other defendant, "was a fool for leaving; that he had a place for him to stay until D came back from R, and then we are going to stop the thing." Defendant W fled on seeing the officer approach, and after his arrest a witness said to him that he was surprised "that he was guilty;" he did not deny his guilt, but said that "S was mighty smart, and if he didn't watch he'd be in his condition and fix." He

told another witness that he had been discharged, but added, "I've got the money just the same": *Held*, that the evidence was sufficient to be left to the jury. *Atkinson*, 93—519.

On the question of identity, evidence that other property stolen at the same time, though not charged in the indictment, was found in the possession of defendant, is competent. *Weaver*, 104—758.

Where several articles are stolen at the same time, or stolen in the progress of a series of acts so connected and continued that they form but one transaction, but one larceny is committed, and an acquittal or conviction upon an indictment charging one, or only a portion, of the articles, will be a good bar to a prosecution for the remainder. *Weaver*, 104—758.

A declaration made by one charged with larceny at the time of his arrest and the finding of the stolen goods in his possession, in respect to the manner in which he obtained possession, may be shown to be false. *Weaver*, 104—758.

Evidence that one of the defendants charged with a larceny committed by breaking into a store at night and taking goods therefrom, had, two years prior to the taking, entered into a conspiracy with the other defendants to break into the store, that he had been arrested for the larceny and had forfeited his bail, and that he was related to some of defendants, is not sufficient to warrant a verdict of guilty. *Eller*, 104—853.

But evidence in addition to this, as to another defendant, that he was related to those who were identified as the thieves; that he resided in their neighborhood, that shortly after the larceny several persons were discovered at night coming away from a place where had been concealed the stolen property, and one witness recognized the defendant in the crowd, all of whom ran when hailed, is sufficient to be submitted to the jury. *Ib*.

Evidence that defendant, who lived near a store which had been broken open and property taken therefrom, left his house after supper, and returned about the time a witness, who in passing was fired upon, and that next morning at breakfast he remarked that he "did not reckon anybody would run in on anybody else again in a close place," is insufficient to be submitted to the jury. *Mitchener*, 98—689.

There was evidence of defendant's guilt introduced by the state, but defendant, as a witness in his own behalf, testified that the prosecutor was drunk, and at his request, he, defendant, was taking care of the property alleged to have been stolen: *Held*, error for the court not to present the case to the jury in the aspect presented by defendant's evidence. *Gilmer*, 97—429.

Defendant and another were sent with a hack to a young lady's room after some baggage to be carried to the depot, and on hearing them approaching, the young lady, stepped into an adjoining room, leaving her writing materials and purse containing three ten-dollar bills lying on the floor. As soon as they were gone with the baggage the young lady returned to the room, and in about half an hour missed her purse. No one had been in the room except defendant and his companion. Defendant's companion testified that as they went in the room defendant stooped down as if to pick up something on the floor, and exclaimed, "Oh, hell!" About three or four hours after this defendant purchased some goods in a store, and handed in a torn ten-dollar bill, but there was no evidence whether any of the bills stolen were torn or not. Defendant's companion was under indictment for the same offence, but in a separate bill: *Held*, that the evidence was sufficient to go to the jury. *Freeman*, 89—469.

Evidence as to the marks upon barrels of brandy alleged to have been stolen is competent to identify the packages. *Kiger*, 115—746.

Evidence which only raises a suspicion or conjecture of guilt, but does not warrant a reasonable conclusion of guilt, ought not to be submitted to the jury. *Bridgers*, 114—868.

On indictment for the larceny of a hog, the property of some person to the jurors unknown, the testimony of witnesses living in defendant's neighborhood to the effect that they lost hogs about the time when defendant sold dressed hogs and brought them to a witness in a cart covered with a cloth, one with its head cut off, and that defendant denied the sale to a witness and then admitted it in the same conversation, is competent, and constitutes sufficient evidence to be left to the jury. *White*, 89—462.

Defendant being charged with the larceny of money from a store, his counsel asked a state's witness if the witness inquired of defendant when he returned to the store what had become of the money, and if defendant gave any explanation: *Held*, that the question was incompetent, since defendant could not give in evidence the fact that he was charged with the larceny simply for the purpose of giving his unsworn declarations when they were no part of the *res gestae*; but had the first testified that the charge was untrue, he could then have given his explanation when first charged as corroborative evidence. *Rhyme*, 109—.

Where the prosecutor testifies that he spent the night on which the larceny was alleged to have been committed at a woman's house, and the woman is not examined as a witness, and no inquiry addressed to the prosecutor as to her reputation, evidence offered afterwards as to the general reputation of the woman is incompetent. *Johnson*, 82—589.

Where the prosecutor testifies that he found the hog alleged to have been stolen by defendant in an enclosure of the defendant, and identified it as his and demanded its delivery to him, it is competent for the state to prove by another witness that at the same time and place, and in the presence of the prosecutor and defendant, such witness said that the other hog therein was his, and that he then and there claimed and demanded it of defendant, since the "collateral offence" is of the same character and connected with that charged, and tends to prove the guilty knowledge of defendant. *Murphy*, 84—742.

Defendant was arrested, tied and carried by an officer to the house of his employer in another county, when a vest, alleged to have been stolen by defendant, was exhibited to the defendant by the employer, and in reply to the question "where did you get that vest?" answered, "From you, sir": *Held*, that defendant's declaration was admissible, no improper influences being shown to exist. *Sanders*, 84—728.

Where the indictment charges the stealing of a trunk, and the evidence against defendant is wholly circumstantial, evidence that the trunk contained a new fifty-dollar bill, and that defendant about three months after the larceny passed a new fifty-dollar bill for small bills, at the same time cautioning the receiver of the bill not to use his name when passing it off, and that defendant left the county next day, is competent. *Bishop*, 73—44.

Evidence that another person who was living with defendant when the cotton was stolen had been indicted in the same bill with defendant, but had severed his trial and had been convicted of stealing the cotton for which defendant was then on trial, is inadmissible, since the guilt or innocence of the other was not necessarily connected with that of defendant. *Beverly*, 88—632.

A defendant under arrest for stealing growing corn may be compelled by the officer having him in charge to put his boot or shoe in a track found in the field for the purpose of comparison, and the result of that comparison is admissible evidence on the trial against the defendant. *Graham*, 79—646.

Evidence that "shortly after the alleged stealing the defendant purchased several articles at a store, and that witness saw a number of bills in the pocket-book of the defendant, of what denomination he was ignorant," is incompetent on indictment for receiving stolen money. *Carter*, 72—99.

Evidence that the prosecutor's hog had been killed and concealed in the corner of the fence covered with leaves, and that defendant was seen at night to go to the place and look carefully around and stoop over as if about to take the hog, and upon being hailed fled, is not sufficient to warrant a verdict of guilty. *Wilkerson*, 72—376.

CONFESSIONS.—Where a white man, the employer of defendant, a colored man, goes with two other white men to the field where defendant is at work, and tells him he has lost a hog, at the same time saying, "I believe you are guilty, if you are you had better say so; if you are not, you better say that," and defendant confesses his guilt, such confession is inadmissible as having been obtained through the influence of hope or fear. *Whitfield*, 70—356.

The officer who arrested defendant tied him, and shortly thereafter defendant said to the officer, "If you will untie me I will tell you all about it," and being untied he confessed his crime: *Held*, that in the absence of evidence that the tying was painful, and to be relieved of the pain formed the inducement to the confession, the admission was competent. *Cruise*, 75—491.

There was evidence that defendant had been charged in his neighborhood with being a common thief, and that notice had been given for a neighborhood meeting "to consult as to what should be done with him about his stealing so much;" that prior to the meeting the defendant went to one of the neighbors engaged in the movement and denied that he had anything to do with the stealing which had been going on; that on the day of the meeting the neighbors assembled and sent word to the defendant that if he would leave the state they would not interrupt him, and two days thereafter he left; that after a few months he returned, and in a few hours after his arrival the same neighbors who took part in the first meeting had again assembled; that upon being asked by the prosecutor, "Are you not ashamed to try to break up an old man as I am by stealing his sheep and hogs?" the defendant replied, hanging down his head, "The first two hogs you lost, I did not get": *Held*, that the confession of defendant was not admissible. *Smith, C. J., and Rodman, J., dissenting. Parish*, 78—492.

The prosecuting witness testified that, on his refusing to sell defendant any mule shoes on a credit, defendant sat down on a keg containing some, and after rattling the shoes for a while with his hand, went out of the store with his right hand in his pocket; that he, the witness, suspected defendant of taking some shoes, but did not know whether any were taken or not; and defendant testified that he bought mule shoes which were soon afterwards found in his possession from one M, who testified that he did not remember selling them to the defendant, but he might have done so as there were many people about his store that day: *Held*, that the evidence raised only a conjecture or suspicion of guilt, and did not reach the dignity of legal evidence. *Bridgers*, 114—868.

17. OWNERSHIP.

Where the two owners of a mill employ another person as miller, giving him onethird of the toll received as compensation for keeping the mill, an indictment for stealing undivided toll-wheat which lays the property in the miller is bad. The property should be charged to belong to one of the owners and others. *Edwards*, 86—666.

The ownership of an unendorsed pension check is properly laid in the person who had it in possession at the time it was taken, as the possession by a bailee is sufficient. Bishop, 98—773.

One who has meat in his own meat-house, keeping it for his sister who lives with him, and who brought the hogs there under an agreement that "she was to live out of them," is a bailee, and the property may be laid in him in an indictment for larceny. Allen, 103—433.

One who carries with him money belonging to another for the purpose of getting it changed for the owner is a bailee of the money, and an indictment for the larceny of it may charge the ownership to be in him. Powell, 103—424.

An indictment for the larceny of undivided seed cotton raised by a tenant under an agreement that the landlord is to have half of it, the cotton being stored in a gin-house on the plantation, may properly charge the cotton to be the property of the tenant and another. Patterson, 68—292.

Where no question is made on the trial as to the ownership of the property alleged to have been stolen, an exception, taken for the first time in the supreme court, that there is a variance between the allegation and the proof, will not avail defendant. Baxter, 82—602.

Where the ownership is laid in a corporation, it is not necessary to aver in the bill the fact that the owner is a corporation, but it is sufficient if the corporate name is correctly set forth. Grant, 104—908.

Where the property is laid in A, and the proof is that it is the joint property of A and B, the variance is fatal. Burgess, 75—272.

Where A places a hog in the possession of B for B to fatten it, the meat to be equally divided between them, an indictment for the larceny of the hog may properly lay the property in B, since, under the agreement, he is the bailee. Hardison, 75—203.

In an indictment for the larceny of bacon belonging to a railroad company, the property was laid in a depot agent of the company who had possession and control of it for the company for the use of its hands: *Held*, that the indictment is defective; the property should have been laid in the railroad company, the agent in such case not being a bailee. Smith, C. J., and Rodman, J., *dissenting*. Jenkins, 78—478.

Under section 368 (Code, sec. 1762), providing that leases of turpentine trees shall be subject to all the provisions of the landlord and tenant act, an indictment for stealing turpentine from the boxes in the trees properly lays the property in the landlord instead of the tenant. King, 98—648.

On indictment for the larceny of whiskey stored in a United States warehouse until it should be gauged and the tax paid, the ownership is properly laid in the owner of the whiskey. Harmon, 104—792.

An indictment for larceny which charges the thing taken to be the property of "J D R and another or others" is fatally defective. Alternative allegations in the same count as to the ownership of the stolen property make it bad for uncertainty. Harper, 64—129.

The initials of the person in whom the property is laid is a sufficient designation of his christian name. Brite, 73—26.

Where the property is laid in "W A C, agent of the Farmers' Exchange," and there is no exception that there is a variance, or that the evidence failed to show a special property in C, the words "agent of the Farmers' Exchange" will be treated as mere surplusage. *Distinguishing* State v. Jenkins, 78—478. Carter, 113—639.

On the trial of one charged with the larceny of some pigs there was some evidence that they were not the property of S as charged in the

bill, and the court charged, at the request of the defendant, that the jury must be satisfied beyond a reasonable doubt that the pigs belonged to S, and in that connection the court said, among other things, "the solicitor has proved by the testimony of S and J that the pigs were the property of S": *Held*, that the latter part of the charge, if construed in connection with the whole case, meant only that it was "in proof for the state by the testimony" of such witnesses, etc., and it was not likely to be misunderstood by the jury as a declaration that the state had proved the ownership to be in S. Jackson, 112—851.

The ownership is properly laid in the bailee if it appears that defendant, when he took possession of the property as agent for the owners, used such agency as a means to get possession to carry out his felonious intent. MacRae, 111—665.

18. DESCRIPTION.

A description of the property stolen as "one pound of meat" is too vague and uncertain, since the term "meat" applies not only to the flesh of all animals, but in a general sense to all kinds of provisions. Patrick, 79—655.

A description of the stolen property as "a parcel of oats," is sufficient. Brown, 12 (1 Dev.), 137.

An indictment for stealing a hat need not describe it as a white or black, or a felt or beaver. Martin, 82—672.

A description of the property stolen as a "bull tongue," the evidence being that defendant stole a particular kind of plow-share usually known in the community by that name, is sufficient. Clark, 30 (8 Ired.), 226.

The goods alleged to be stolen may be described by the names by which they are known in trade, and the same principle extends to articles known by particular names in all the arts, pursuits and employments of life. Clark, 30 (8 Ired.), 226.

Where the thing stolen is at the time of stealing in a raw or unmanufactured state, it may be described by its name and as so much thereof in quantity, weight or measure; but if at that time it had been worked up into a specific article and so remains, it must be described by the name by which such article is generally known. Horan, 61 (Phil.), 571.

19. CHARGE.

On indictment for larceny and receiving, an omission of the judge to charge that there is no evidence to support the count for receiving, is not assignable for error, where there is no prayer for instructions, and no exception to the charge until after verdict convicting defendant of receiving alone. Nicholson, 85—548.

Defendant, who was charged with stealing a hog, contended that certain pork found in his house was part of a hog of his own, and two of his children testified that he had killed a hog of his own the day before the pork was found: *Held*, error to charge that "there was no evidence that the hog was the property of any one except the prosecutor." Meacham, 78—477.

The prosecutor found his hog in the pen of defendant with the earmarks just changed to that of defendant. Defendant explained his possession by saying he got it of a certain neighbor, and the neighbor testified that the hog came to his house, and while there he inquired of defendant as to whom it belonged, who after looking at the hog claimed it and carried it off. There was no attempt at concealment, and defendant did

not explain the altering of the mark: *Held*, that the court properly instructed the jury that if defendant took the hog under a false claim of right, and for the purpose of depriving the real owner of his property, and converting it to his own use, he was guilty, notwithstanding he took it openly. Fisher, 70—78.

20. ARREST OF JUDGMENT.

The court can not proceed to judgment on a general verdict of guilty upon an indictment charging in the first count the larceny of a horse, and in the second count receiving the same horse knowing him to have been stolen, *when both counts conclude against the statute*, since the punishment is different for each offence, and the court can not determine upon which count to give judgment. (Code, sections 1074, 1066.) Goings, 98—766.

Where the indictment contains two counts, one for larceny and the other for receiving the stolen goods, and there is a verdict of guilty on the second count only, and the count for receiving does not mention the name of the defendant in the commencement of the statement of the offence charging the receiving, the judgment must be arrested, though his name is subsequently introduced in the clause charging that he well knew the goods had been stolen. Phelps, 65—450.

An indictment containing two counts, one charging defendant with stealing an ox and the other with stealing one pound of beef, may be quashed on motion made in apt time, or the solicitor required to elect, but after verdict a motion in arrest of judgment can not be sustained. Reel, 80—442.

Judgment can not be arrested where there is a general verdict of guilty on an indictment containing two counts, one for larceny and the other for receiving, on the ground that the indictment contains two counts charging different offences with different punishments, because, under Const. N. C., art. 6, sec. 1, persons convicted of larceny are deprived of the right of suffrage, and under section five of the same article are disqualified for holding office, and because receiving is only a misdemeanor, since the disqualification for office and the loss of the right of suffrage constitute no part of the judgment of the court. Jones, 82—685.

NO ACCESSORIES IN LARCENY.—There can be no accessories before the fact in larceny; all who aid, abet, advise or procure the crime to be committed are principals. Stroud, 95—626.

21. FORMER ACQUITTAL.

After acquittal on an indictment for stealing "a certain bank-note issued by the Bank of New Bern," because the note offered in evidence was issued by "The President and Directors of the Bank of New Bern," a plea of former acquittal to a second indictment for stealing "a certain bank-note issued by the President and Directors of the Bank of New Bern," is not supported by the production of the record of the first indictment. Williamson, 7 (3 Murph.), 216.

Where defendant has been acquitted on an indictment charging him with stealing a sheep the property of P P, on the ground that the owner of the property was unknown, but is again indicted for the same offence, the sheep being charged to be the property of some one to the jurors unknown, the plea of former acquittal will not avail him, since the facts charged in the second indictment would not, if proven, have supported the first. Revels, 44 (Busb.), 200.

22. VERDICT.

The jury rendered a verdict of "not guilty of the felony and horse-stealing, but guilty of trespass," but the court directed them to reconsider their verdict and say "guilty or not guilty," and no more; thereupon they retired and again returned with a verdict of "guilty": *Held*, that, since the first verdict was in effect an acquittal, it was proper to still have it recorded and discharge the defendant. Arrington, 7 (3 Murph.), 571.

In an indictment containing two counts, one for larceny and the other for receiving stolen goods, the jury may bring in a general verdict of guilty, the grade of punishment being the same for each offence. Baker, 70—530.

Where the indictment contains several counts, and the jury is directed to confine its investigation to one count only, a general verdict of guilty will be construed as an acquittal on all the counts withdrawn. Thompson, 95—596.

Where the verdict charges the larceny of cotton and receiving the same knowing it to have been stolen, and the verdict returned is "guilty of receiving stolen cotton," no judgment can be pronounced. To constitute the offence of receiving, the goods must be shown to be the property of the person alleged to be the owner, and it must also be shown that defendant received them *with a knowledge of the fact that they had been stolen*. Whitaker, 89—472.

The bill charged the larceny of a trunk, and there was proof that the trunk contained a fifty-dollar bill, and the jury returned a verdict of "guilty of the larceny of a fifty-dollar note." The court informed them that defendant was not charged with the larceny of the note but of the trunk, and the jury again retired, and soon returned with a verdict of guilty of the larceny of the trunk: *Held*, that as the first verdict was not received or recorded, nor the jury discharged, it was competent for them to correct the inadvertence, and make the verdict responsive to the indictment. Bishop, 73—44.

23. VARIANCE.

Where the indictment alleges the stealing of a "calf" skin, and there is a conflict of testimony as to whether it was a "calf" skin or a "kip" skin, a tanner testifying that a calf skin is from a veal from six to ten weeks old, and a kip skin from one from ten weeks to twelve months old, the disputed question is properly left to the jury; besides if the proof should be that it was a kip skin there would be no variance, since the distinction is not a practical one, and there is no rule of law by which the court can say when the "calf" ceases and the "kip" begins. Campbell, 76—261.

Where the indictment charges the stealing of a *steer* and the evidence shows that it was a bull, defendant is entitled to an acquittal. Royster, 65—539.

An allegation that defendant stole three bushels of corn is supported by proof that he stole three bushels of corn in the ear. Nipper, 95—653.

An indictment for stealing "fifty pounds of flour of the value of sixpence" is good, and is sustained by proof that defendant stole a *sack* of flour, though there is no proof of its weight or value further than the defendant had said he gave five dollars and a half for it. Harris, 64—127.

Where the indictment charges the larceny of "two barrels of turpentine," and there is a special verdict finding that defendant secretly dipped out of the boxes in the trees as much turpentine in quantity as two barrels, and put the same into two barrels which he had provided and kept concealed

in the woods, and that he afterwards secretly carried away and sold the two barrels of turpentine for his own gain, the variance is fatal, since under Code N. C., sec. 3028, a barrel of turpentine means not only a certain quantity which is prescribed, but also that it is in a certain state, that it must be in good and sufficient "casks" made of staves of prescribed dimensions; whereas in this case the turpentine was not in barrels when taken. Moore, 33 (11 Ired.), 70.

Where the indictment charges that A committed the theft, and B was present aiding and abetting, and the proof is that B committed the theft and A was present aiding and abetting, there is no variance, since there are no accessories before the fact in larceny, but all who aid and abet are principals. Fox, 94—928.

Where the indictment gives the christian name of the owner of the property as Elizabeth, and the evidence shows that she is called Betsy, the defendant, in order to take advantage of the seeming variance, must ask the court to instruct the jury that if the owner was not known by the name of Elizabeth, or if that was not her name, they should acquit, but to ask the judge to direct a verdict of acquittal is to ask him to decide the fact himself which is properly for the jury. Godet, 29 (7 Ired.), 210.

Where the indictment charges the larceny of a hog, and the evidence is that defendant stole a shoat, the variance is immaterial. Godet, 29 (7 Ired.), 210.

Where the indictment charges the larceny of "thirty dollars in money," and the proof is that defendant stole "three ten-dollar bills," there is no variance. Freeman, 89—469.

Where there are two counts, one charging the larceny of cattle, the property of A, and the other charging the larceny of cattle, the property of some person to the jurors unknown, evidence that A about the time lost a number of cattle will not justify a verdict that defendant stole certain cattle the property of some persons to the jurors unknown. Rawlston, 73—180.

24. MISCELLANEOUS.

AIDING AND ABETTING THE THIEF.—All persons who counsel, aid, abet or advise a larceny are equally guilty with the one who actually commits the offence, whether they were present or not. Gaston, 73—93.

CIRCUMSTANTIAL EVIDENCE.—Where the evidence is circumstantial, the accused is not entitled to a charge that it must be as conclusive as if an eye-witness had testified to the fact. Allen, 103—433.

JURISDICTION.—Rev. St. U. S., sec. 3296, making it indictable to remove distilled spirits from a government warehouse before the taxes are paid, does not deprive the state courts of jurisdiction of the crime of larceny of such spirits taken from the warehouse, since the Federal statutory offence is quite distinct from the crime of larceny. Harmon, 104—792.

PUNISHMENT.—Where the indictment contains two counts, the first charging the larceny of a horse and *concluding at common law*, and the second charging the receiving the horse, knowing him to have been stolen, and concluding against the statute, and there is a general verdict of guilty, the punishment can not exceed ten years' imprisonment. Lawrence, 81—522.

LARCENY A BAR TO PROSECUTION FOR ROBBERY OF THE SAME GOODS.—Where two bills are found against the defendant, one for burglary and larceny and the other for a robbery, both charging the same felonious taking of the same goods, a conviction for larceny on the first indictment is a bar to a prosecution under the second, since robbery is only an aggravated kind of larceny. Lewis, 9 (2 Hawks), 98.

ELECTION.—Where the indictment charges larceny and receiving, the court will not require the solicitor to elect on which count he will proceed. *Morrison*, 85—561.

SOLICITOR'S FEES ON CONVICTION FOR RECEIVING.—On conviction of defendants on a charge of larceny and receiving, the solicitor is not entitled to a fee of ten dollars. The words "misdemeanors of accessories after the fact to felonies" (The Code, sec. 3737) do not embrace receivers of stolen goods, since there are now no accessories to the crime of larceny, but all are principals. *Tyler*, 85—569.

CONCLUSION OF INDICTMENT WHEN GRADE OF OFFENCE RAISED.—Where the grade of a common law offence has been made higher by statute, the indictment must conclude against the statute, but when the punishment has been mitigated it may conclude at common law. *Lawrence*, 81—522.

DESCRIPTION OF PENSION CHECK.—A description of the property alleged to have been stolen as "one United States pension check on the assistant treasurer of the United States for twenty dollars," is sufficient. *Bishop*, 98—773.

OBJECTION FOR DUPLICITY MUST BE TAKEN BEFORE VERDICT.—An indictment for larceny containing but one count charging the ownership of the property stolen as one hundred pounds cotton, the property of C, one hundred pounds cotton, the property of G, is bad for duplicity and obscurity, but if objection is not taken by motion to quash, the defect is cured by the verdict under Code of N. C., sec. 1183. *Simons*, 70—336.

INDICTMENT FOR AN ATTEMPT TO STEAL.—An indictment for an attempt to steal, which alleges that defendant entered the prosecutor's house and ransacked his drawers, chests and closets, is sufficient without specifying the particular articles intended to be stolen. *Utley*, 82—556.

REMARK OF BY-STANDER.—During the argument of a motion for a continuance in the presence, but prior to the impaneling of the jury, a by-stander remarked in open court that the prisoner's wife said she would not come to trial because she would only help get her husband in jail. *Held*, that this was not ground for exception, as it did not occur on the trial, and if it had the remark was not admitted as evidence, and being an unsworn statement it could not have been deemed to bias the jury against the sworn testimony placed before them. *Jackson*, 112—851.

VERDICT OF GUILTY CONSTRUED.—A verdict of guilty in larceny is construed as if the words "in manner and form as charged in the bill of indictment" were added to it. *Barber*, 113—711.

INDICTMENT—ARREST OF JUDGMENT.—Where an indictment charges the larceny of a horse to have been committed at a certain time, *since* the passage of the only statute prescribing the punishment for horse-stealing, judgment can not be arrested on the ground that prior to that time there had been several statutes prescribing different modes of punishment for such offence. *Distinguishing State v. Wise*, 66—120. *Evans*, 69—40.

INDICTMENT—STEALING FISH.—An indictment for the larceny of fish which fails to allege that the fish were reclaimed, confined or dead and valuable for food, can not be sustained. *Krider*, 78—481.

ELECTION.—Where the indictment contained two counts, one for larceny and the other for receiving, and the evidence tended to show that some of the defendants (who were convicted under the count for larceny) had been stealing tobacco from the same owner at various times, and had been disposing of it, at a price much below its market value, to B, who knew it to have been stolen, it was within the discretion of the trial judge to determine whether he would compel the solicitor to elect on which count he would proceed against B. *Barber*, 113—711.

25. RECEIVING STOLEN GOODS.

Sec. 375 (1074). Larceny, receivers of stolen goods, punishment of. R. C., c. 34, s. 56. 1797, c. 485, s. 2.

If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof shall amount to larceny or felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security, or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession, or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny.

WHAT CONSTITUTES RECEIVING.—To constitute the crime of receiving, it is not necessary that the stolen goods should be traced to the actual personal possession of the person charged; it is sufficient if it be shown that they were received by his agent or servant, or at his instigation deposited in some place directed by him, he knowing that they were stolen. Stroud, 95—626.

Receiving stolen goods, knowing them to be stolen, simply for the purpose of aiding the thief in concealing and carrying them off, makes the receiver guilty. Rushing, 69—29.

INDICTMENT—ARREST OF JUDGMENT.—Where the indictment contains two counts, one for larceny and the other for receiving the stolen goods, and there is a verdict of guilty on the second count only, and the count for receiving does not mention the name of the defendant in the commencement of the statement of the offence charging the receiving, the judgment must be arrested, though his name is subsequently introduced in the clause charging that he well knew the goods had been stolen. Phelps, 65—450.

EVIDENCE.—A person indicted for receiving stolen goods has a right to show by himself, as well as by other witnesses, that he got them honestly, and to this end he may show where he got them, from whom, how, under what circumstances, and what was done and said at the time in connection with the receipt of them by himself and the person from whom he received them. Such conversation forms part of the *res gestae*. Bethel, 97—459.

CHARGE.—On indictment for larceny and receiving, an omission of the judge to charge that there is no evidence to support the count for receiving is not assignable for error, where there is no prayer for instructions, and no exception to the charge until after verdict convicting defendant of receiving alone. Nicholson, 85—548.

PERSON FROM WHOM PROPERTY RECEIVED MUST BE GUILTY OF LARCENY.—On indictment for receiving a stolen horse, there was evidence that the person from whom defendant received the horse went to the prosecutor's stables and promised to give the prosecutor's son \$75 for the horse, knowing that it did not belong to the son but to the father, and that in company with the son he carried the horse off, promising to pay the money at a future time: *Held*, that it was error to refuse to charge that defendant could not be convicted of receiving unless the person from whom he received the horse was guilty of larceny, and that such person was not guilty of the larceny if he got the horse in such manner and believed the son could sell the same. *Shoaf*, 68—375.

NOT NECESSARY TO STATE FROM WHOM GOODS RECEIVED.—An indictment for receiving stolen goods knowing them to have been stolen need not state from whom the goods were received. *Martin*, 82—672.

GENERAL VERDICT OF GUILTY.—Where the indictment contains two counts, one charging larceny and the other the receiving the goods alleged to have been stolen, a general verdict of guilty may be returned, as the grade of punishment is the same for both offences. *Baker*, 70—530.

ARREST OF JUDGMENT.—An indictment charged the larceny of cotton and receiving the same knowing it to have been stolen, and the jury returned a verdict of "guilty of receiving stolen cotton": *Held*, that no judgment could be pronounced, since to constitute the offence of receiving, the goods must be shown to be the property of the person alleged to be the owner, and it must also be shown that defendant received them *with a knowledge of the fact that they had been stolen*. *Whitaker*, 89—472.

PERSONS FROM WHOM GOODS RECEIVED NEED NOT BE NAMED.—An indictment for receiving stolen goods need not contain an averment of the person from whom the goods were received. Correcting and overruling *State v. Beatty*, 61 (Phil.), 52. *Minton*, 61 (Phil.), 196.

An indictment for receiving stolen goods must aver from whom the goods were received so as to show that he received them from the principal felon, since if he received them from any other person the statute does not apply. *Ives*, 35 (13 Ired.), 338.

NOTE.—*Ives'* case was decided under the Revised Statutes, c. 34, sec. 54, which provided that "if any person shall receive or buy any property that shall be feloniously stolen or taken from any other person, knowing the same to be stolen," etc.; while *Martin's* case, 82—672, and *Minton's* case, 61 (Phil.), 196, were decided under our present statute, which omits the words "from any other person."

Judgment can not be arrested where there is a general verdict of guilty on an indictment containing two counts, one for larceny and the other for receiving, on the ground that the indictment contains two counts charging different offences with different punishments, the receiving being only a misdemeanor, and under Const. N. C., art. 6, sec. 1, persons convicted of larceny are deprived of the right of suffrage, and under section five of the same article are disqualified for holding office, since the disqualification for office and the loss of the right of suffrage constitute no part of the judgment of the court. *Jones*, 82—685.

[For other decisions on the subject of Receiving, see general subject Larceny.]

A general verdict of guilty upon an indictment containing two counts, one for stealing a horse and the other for receiving the horse knowing the same to have been stolen, is error when both counts conclude against the form of the statute. *Johnson*, 75—123.

PERSON FROM WHOM GOODS RECEIVED MUST BE NAMED.—An indictment for receiving stolen goods must aver from whom the goods were received

so as to show that defendant received them from the principal felon. Ives, 35 (13 Ired.), 338.

NOT NECESSARY TO STATE FROM WHOM GOODS RECEIVED.—An indictment for receiving need not state from whom the goods were received. Martin, 82—672.

STEALING HORSE AND RECEIVING.—A count for the larceny of a horse, concluding at common law, may be joined with a count for the statutory offence of receiving the same, and the indictment thus drawn will warrant a general verdict of guilty. Lawrence, 81—522.

DEFENDANT MAY SHOW BONA FIDE POSSESSION.—A defendant indicted for receiving stolen goods has a right to show by himself, as well as other witnesses, that he got them honestly, and to this end may show where he got them, from whom, how, under what circumstances, and what was done and said at the time in connection with the receipt of them by himself and the person from whom he received them. Such conversation forms a part of the *res gestae*. Bethel, 97—459.

AIDING THE THIEF.—If a person receive stolen goods, knowing them to be such, not for the purpose of making them his own, or of deriving profit from them, but simply to aid the thief in carrying them off, he is guilty of the crime of receiving stolen goods. Rushing, 69—29.

KNOWLEDGE AT TIME OF RECEIVING.—To render a person guilty of receiving stolen property he must know at the moment of receiving it that it was stolen, and he must at the same time receive it with a felonious intent. Caveness, 78—484.

VERDICT.—The indictment contained two counts, one for larceny and the other for receiving, and the jury rendered a verdict that certain of the defendants "are guilty of larceny, and that the defendant B is guilty of receiving, knowing the tobacco to have been stolen": *Held*, that the verdict as to B, taken in connection with the indictment, is sufficiently clear and intelligible to show that it is a conviction upon the second count. Barber, 113—711.

On indictment for receiving a stolen horse, there was evidence that the person from whom defendant received the horse went to the prosecutor's stables and promised to give the prosecutor's son \$75 for the horse, knowing that it did not belong to the son, but to the father, and that in company with the son he carried the horse off, promising to pay the \$75 at a future time: *Held*, that it was error to refuse to charge that defendant could not be convicted of receiving unless the person from whom he received the horse was guilty of larceny, and that such person was not guilty of the larceny if he got the horse in such manner and believed the son could sell the same. Shoaf, 68—375.

DEFENDANT'S CHARACTER.—The court charged the jury that the state could not introduce evidence as to defendant's character, but it was the right of defendant to offer it if he chose, and he had not done so, but that no unfavorable inference could be drawn from his failure to do so: *Held*, that though the first part of the charge was erroneous, yet the error was cured by the latter part. Saunders, 84—728.

26. PUNISHMENT—VALUE.

Sec. 376. Punishment where value of property less than \$20; exceptions. 1895, c. 285.

SECTION 1. In all cases of larceny where the value of the property stolen does not exceed twenty dollars, the punishment shall,

for the first offence, not exceed imprisonment in the penitentiary, or common jail, for a longer term than one year.

SEC. 2. If the larceny is from the person, or from the dwelling by breaking and entering in the daytime, section one of this act shall have no application.

SEC. 3. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.

Where the property is of less value than \$20 an admission by defendant of a conviction of a prior larceny will not justify a sentence exceeding one year, there being no allegation that this is a second offence, since section 1187 of The Code prescribes that when a second conviction is punished with other or greater punishment than the first, the first conviction shall be charged in the manner therein set out, and what proof shall be sufficient. In this case there was no evidence of larceny from the person, or that defendant broke into a dwelling house. Davidson, 124—.

If there is a dispute about the value of the thing taken it is the duty of the defendant to demand a finding upon that subject by the jury. Harris, 119—811.

The hand is a part of one's person, and the exception in section 2 of the statute is not restricted to cases of taking something concealed about the body. In this case a purse was snatched from the hand of the prosecutor. Harris, 119—811.

It is not necessary that the indictment should charge the taking from the person or from a dwelling house when the larceny is of a sum less than \$20. These are matters of defence which it is incumbent on defendant to show in diminution of the sentence in case of a conviction. Harris, 119—811.

It is not necessary to allege that the larceny was from the person in order to prove that fact and make the case punishable by sentence exceeding one year. Bynum, 117—749.

Where money was taken from each of two persons at the same time, a conviction for having stolen the money from one is not a bar to a prosecution for stealing the money of the other. Bynum, 117—749.

27. BANK-NOTES AND SECURITIES.

Sec. 377 (1064). Larceny or robbery of bank-notes and other securities. R. C., c. 34, s. 20. 1811, c. 814, s. 1.

If any person shall feloniously steal, take and carry away, or take by robbery, any bank-note, check, or order for the payment of money issued by, or drawn on any bank, or other society or corporation within this state, or within any of the United States, or any treasury warrant, debenture, certificate of stock, or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation, (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying

away, or taking by robbery, shall be felony of the same nature and degree, and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods, or property of any value, and such offender for every such offence shall suffer such punishment, and be subject to the same pains, penalties and disabilities as he should or might have suffered, if he had feloniously stolen or taken by robbery, money, goods, or other property of value.

INDICTMENT.—An indictment charging the larceny of "one bill of fractional currency of the value of fifty cents," and concluding at common law, and not against the statute, is defective. Dill, 75—257.

On indictment for stealing a bank-note a description of the note as "one twenty-dollar bank-note on the State Bank of North Carolina of the value of twenty dollars" is good. Rout, 10 (3 Hawks), 618.

DUE BILL.—A "due bill" is within the meaning of the words "or other obligation." Campbell, 103—344.

28. LARCENY BY SERVANTS.

Sec. 378 (1065). Larceny, by servant of master's good. R. C., c. 34, s. 18. 21 Hen. VIII., c. 7, ss. 1, 2. 39 Geo. III., c. 85. 7, 8 Geo. IV., c. 29, s. 47. 24, 25 Vict., c. 96, s. 68.

If any servant or employee, to whom any money, goods, or other chattels, or any of the articles, securities, or choses in action mentioned in the preceding section, by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master, and go away with the said money, goods, or other chattels, or any of the articles, securities, or choses in action mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by said master; or if any servant, being in the service of his master, without the assent of his master, shall embezzle such money, goods, or other chattels, or any of the articles, securities, or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or defraud his master thereof, the servant so offending shall be fined, or imprisoned in the penitentiary or county jail, not less than four months nor more than ten years, at the discretion of the court: *Provided*, that nothing in this section contained shall extend to apprentices, or servants within the age of eighteen years.

FIELD HAND.—A person employed as a "field hand," working by the day, week or month, has no charge of his employer's money, and if the latter entrust him with money and he embezzles it, he is not guilty of larceny. Fann, 65—317.

INDICTMENT.—An indictment under this section must allege that the property had been committed to defendant in trust, and being so held was

feloniously conveyed or made away with by the servant or agent. Wilson, 101—730.

SERVANT.—If a servant entrusted with the custody of goods by his master fraudulently take them to convert them to his own use, he is guilty of larceny. Jarvis, 63—556.

SERVANT EMPLOYED BY MARRIED WOMAN.—A married woman engaged in the business of selling milk in her own name, her husband having nothing to do with the business, is competent to make a valid contract in respect to such business, though she is not a "free trader," and one employed by her to sell milk and collect the money for it, may be convicted for embezzling the money collected. Lanier, 89—517.

WHO IS A SERVANT.—Where one employed by a merchant "to sweep out the store, and wait about the store, but not as clerk," is authorized by the merchant to take a lot of shoes and sell them during his visit to a neighboring town, and he does sell them for a less price than he was authorized to receive, and converts the money to his own use, he is a servant within the meaning of the act, and guilty of embezzlement. Costin, 89—511.

29. HORSE-STEALING.

Sec. 379 (1066). Larceny; horse-stealing. 1868, c. 37, s. 1. 1879, c. 234, s. 2. 1866-'7, c. 62.

Every person who shall steal any horse, mare, gelding or mule, shall suffer imprisonment at hard labor for not less than five nor more than twenty years, at the discretion of the judge.

A count under this section may be joined in a bill of indictment with a count under the succeeding section.

INDICTMENT—ARREST OF JUDGMENT.—Where there is a general verdict of guilty on an indictment charging in the first count the larceny of a horse, and in the other the receiving of the same, knowing it to have been stolen, *and both counts conclude against the statute*, no judgment can be pronounced, since the punishment is different for each offence, and the court can not determine upon which count to give judgment. Sections 379, 375. (The Code, sections 1066, 1074). Goings, 98—766.

STEALING AND RECEIVING HORSE.—A count for the larceny of a horse, *concluding at common law*, may be joined with a count for the statutory offence of receiving same, and the indictment thus drawn will warrant a general verdict of guilty. Lawrence, 81—522.

Sec. 380 (1067). Larceny, stealing horse for temporary use or purpose. 1879, c. 234, s. 1.

If any person shall unlawfully take and carry away any horse, gelding, mare or mule, the property of another person, secretly and against the will of the owner of said property, with intent to deprive the owner of said property of the special or temporary use of the same, or with the intent to use said property for a special or temporary purpose, the person so offending shall be guilty of larceny, and punished by imprisonment in the penitentiary or county jail, not less than four months nor more than ten years, and fined, in the discretion of the court: *Provided*, this section shall not be construed to repeal or in any way affect the preceding section.

An indictment for stealing the temporary use of a horse is not defective because it charges the stealing of the temporary use of a buggy also. *Darden*, 117—697.

30. LARCENY OF LIVE STOCK.

Sec. 381 (1068). Larceny, the felonious injury to, or pursuit of, live stock, with intent to appropriate the same, a misdemeanor. 1866, c. 57.

If any person shall pursue, kill or wound any horse, mule, ass, jenny, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a misdemeanor, and shall be punishable in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending. And all persons commanding, counselling, advising, aiding or abetting any of such unlawful acts shall be punished in like manner, and may be prosecuted alone, or with the principal actor.

INDICTMENT.—An indictment charging the killing of a “certain *cattle beast*,” is sufficiently definite in stating the kind of cattle killed. *Credle*, 91—640.

EVIDENCE.—Parol evidence of the contents of a notice posted by the prosecutor, forbidding all persons from trading for or buying his cattle, is competent on the trial for killing cattle under this section, since such notice is entirely collateral to the issue, and defendant is not a party to it. *Credle*, 91—640.

KILLING DONE WITHOUT SECRECY.—Evidence that the killing was done openly and without secrecy may be submitted to the jury on the question of a felonious intent, but it does not necessarily disprove it. *Credle*, 91—640.

STOCK LAW.—The fact that the stock law prevails in a county, is no defence to an indictment for injury to stock running at large. *Rivers*, 90—738.

31. GROWING CROPS.

Sec. 382 (1069). Larceny of growing crops or vegetables. 1811, c. 816. R. C., c. 34, s. 21. 1868-'9, c. 251.

If any person shall steal, or feloniously take and carry away any maize, corn, wheat, rice, or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, or any fruit, vegetable, or other product cultivated for food or market, growing, standing or remaining ungathered, in any field or ground, he shall be guilty of larceny, and punished accordingly.

INDICTMENT—UNGATHERED FIGS.—An indictment for the larceny of ungathered figs which fails to allege that they were “cultivated for food or market,” is fatally defective. *Liles*, 78—496.

Where the indictment simply charges the stealing of “seed cotton and lint cotton,” an instruction that if the jury believe that the cotton was gathered from the field with a felonious intent, defendant would be guilty, is erroneous. To render such evidence and charge proper the

indictment should have been drawn under the statute, and describe the crop as "growing, standing or ungathered" in the field, and cultivated for food or market. Bragg, 86—687.

WATERMELON.—An indictment under this statute for stealing a watermelon, which fails to allege that it was cultivated for food or market, is fatally defective, since the word watermelon is not used in the statute. Thompson, 93—537.

UNGATHERED CORN.—An indictment for stealing ungathered corn need not allege that the crop was "cultivated for food or market," as these words of the statute are limited to "any fruit, vegetable or other product," and do not apply to the articles specifically named. Ballard, 97—443.

CABBAGE.—An indictment charging the larceny of cabbage standing ungathered in the field, and concluding at common law, can not be sustained. Foy, 82—679.

SEED COTTON AND LINT COTTON.—Where the indictment simply charges the stealing of "seed cotton and lint cotton," an instruction that if the jury believe that the cotton was gathered from the field with a felonious intent, defendant would be guilty, is erroneous. To render such evidence and instruction proper the indictment should have been drawn under the statute, and describe the crop as "growing, standing or ungathered" in the field, and cultivated for food or market. Bragg, 86—687.

32. STANDING TIMBER.

Sec. 383 (1070). Larceny of wood or other property, growing or being upon land. 1866, c. 60.

If any person, not being the present owner or *bona fide* claimant thereof, shall wilfully and unlawfully enter upon the lands of another and carry off or be engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offence. And if not done with such intent, shall be guilty of a misdemeanor.

TITLE MAY BE SHOWN IN A THIRD PERSON.—A tenant who leases a certain portion of a larger tract of land, on indictment against him for cutting timber upon the land outside of that embraced by his lease, is entitled to show title to the land in a third person, and that he entered and cut the timber, after having been forbidden to cut timber outside of his lease, as the agent or employee of such third person, since the purpose of the statute is not to prevent a simple trespass affecting merely the possession, but to prevent the taking of personal property from the land by some person *other* than the owner, and one who cuts and carries away timber as the servant of the owner is not guilty. Boyce, 109—.

TENANT NOT ESTOPPED TO DENY LANDLORD'S TITLE.—The tenant in such case is not estopped to deny his landlord's title to that part of the tract not embraced in his lease and from which the timber was cut, since he had no possession nor right of possession beyond the boundary of the land leased to him. Boyce, 109—.

OWNER NOT INDICTABLE THOUGH NOT IN POSSESSION.—The owner, or *bona fide* claimant, is not indictable for cutting and carrying away timber

from the land, though he is not in possession. The statute does *not* prohibit the simple invasion of the prosecutor's possession. Boyce, 109—.

This statute does not embrace or contemplate a taking and carrying away of *money*; it means only such property as was not, at common law, subject to larceny. Vosburg, 111—718.

33. PUBLIC RECORDS.

Sec. 384 (1071). Larceny or obliteration of public records, or fraudulent removal of registration book; not necessary to allege ownership or value. R. C., c. 34, s. 31. 8 Hen. VI., c. 12. 1881, c. 17.

If any person shall steal, or for any fraudulent purpose, shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, pending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree or any original document whatsoever, of or belonging to any court or relating to any cause or matter begun, pending or terminated in any such court, every such offender shall be guilty of a misdemeanor; and in any indictment for such offence it shall not be necessary to allege that the article, in respect to which the offence is committed, is the property of any person or that the same is of any value. And if any person shall steal, or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, or shall unlawfully and wilfully obliterate, injure or destroy any book wherein deeds or other instruments of writing are registered, or any other book of registration, or record required to be kept by the register of deeds, or shall unlawfully destroy, obliterate, deface or remove any record of proceedings of the board of county commissioners, or unlawfully and fraudulently abstract any record, receipt, order or voucher or other paper-writing required to be kept by the clerk of the board of commissioners of any county, he shall be guilty of a misdemeanor.

INDICTMENT—VARIANCE.—An allegation that defendant stole a *fl. fa.* "issued from the superior court office" is not sustained by proof that the *fl. fa.* was made out, but retained by the clerk, at the instance of defendant, until the amount was paid to him. McLeod, 50 (5 Jones), 318.

INDICTMENT—OBSCURITY.—An indictment for larceny charging in one count the thing stolen to be "a certain writ of *fl. fa.* belonging to the superior court;" in another count "a certain process of and belonging to the superior court," and in a third "a certain record of and belonging to the superior court," is too vague to authorize a conviction under it. McLeod, 50 (5 Jones), 318.

34. LARCENY OF WILLS.

Sec. 385 (1072). Larceny, fraudulent concealment or destruction of wills. R. C., c. 34, s. 32.

If any person, either during the life of the testator or after his death, shall steal or for any fraudulent purpose destroy or conceal any will, codicil or other testamentary instrument, he shall be guilty of a misdemeanor.

35. PUBLIC LAWS AND DOCUMENTS.

Sec. 386 (1073). Larceny, fraudulent disposition by clerk, or other custodian of the public laws, reports of supreme court or other public documents, a misdemeanor. 1881, c. 151.

It shall be the duty of the clerk of the superior court of each county, and every other person to whom the acts of the general assembly, supreme court reports, or other public documents are transmitted or deposited for the use of the county or the state, to safely keep the same in their respective offices; and if any such person having the custody of such books and documents, for the uses aforesaid, shall negligently and wilfully dispose of the same by sale or otherwise; or refuse to deliver over the same to his successor in office, he shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, at the discretion of the court.

36. GRAND AND PETIT LARCENY.

Sec. 387 (1075). Larceny, distinction between grand and petit larceny abolished. R. C., c. 34, s. 26.

All distinction between petit and grand larceny, where the same hath had the benefit of clergy, is abolished; and the offence of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny is: *Provided*, that in cases of much aggravation, or of hardened offenders, the court may, in its discretion, sentence the offender to the penitentiary for a period not exceeding ten years.

EFFECT OF STATUTE.—The effect of this statute is to reduce all felonious stealing to the grade of petit larceny. Following *State v. Tyler*, 85—569. Stroud, 95—626.

37. MONEY—INDICTMENT FOR STEALING.

Sec. 388 (1190). In indictments for larceny of money, treasury notes or bank-notes, sufficient to describe such money or notes simply as money without specifying the kind. 1876-'7, c. 68.

In every indictment in which it shall be necessary to make any averment as to the larceny of any money, or United States treas-

ury note, or any note of any bank whatsoever, it shall be sufficient to describe such money, or treasury note, or bank-note, simply as money, without specifying any particular coin, or treasury note, or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or treasury note, or bank-note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank-note, shall not be proven.

Inasmuch as money is the measure of values, a charge in an indictment of taking "ten dollars in money" is an allegation of taking the value of ten dollars. Brown, 113—645.

A charge of the theft of "\$5 in money of the value of \$5" is good, and is sustained by proof of the theft of any amount of coin or treasury or bank note. Carter, 113—639.

LETTERS AND TELEGRAMS.

Sec. 389. Letters and telegrams, unlawful to divulge contents. 1889, c. 41.

Any person who wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger, or other employee of a telegraph company; or, being such clerk, operator, messenger, or other employee, wilfully divulges to any but the persons for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or wilfully refuses or neglects duly to transmit or deliver the same, shall be guilty of a misdemeanor.

Any person who wilfully, and without authority, opens or reads, or causes to be opened and read, a sealed letter or telegram, or publishes the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, shall be guilty of a misdemeanor.

Any person so convicted shall be fined or imprisoned, or both, in the discretion of the court having jurisdiction thereof.

INDICTMENT.—An indictment which fails to charge that the letter or telegram was sealed, or that it was published with knowledge that it had been opened and read without authority can not be supported. Bagwell, 107—859.

LEWD WOMEN.

Sec. 390. Lewd women committing acts of lewdness with student, indictable. 1889, c. 523.

Any loose woman or women of ill-fame who shall commit any act of lewdness with or in the presence of any student, who is under twenty-one years old, of any boarding-school or college of this state, within three miles of such school or college, shall be guilty of a misdemeanor, and upon conviction thereof before a justice of the peace shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: *Provided*, that upon the trial of any such cases, students may be competent but not compellable to give evidence: *And provided further*, that no prosecution shall be had in such cases after the lapse of six months.

LIBEL.

Sec. 391 (1195). In indictment for libel, defendant may give the truth in evidence. R. C., c. 35, s. 26. 1803, c. 632.

Every defendant who shall be charged by indictment with the publication of a libel may prove on the trial for the same the truth of the facts alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge.

GENERAL REPORT OR RUMOR NO DEFENCE.—Where the indictment charges the publication of an article in which it was alleged that the prosecutor "is called a murderer and foresworn," defendant can not justify by proving that there has been a rumor and general report in the neighborhood that the prosecutor was a murderer and foresworn. Proving a rumor is not proving the truth of the facts alleged. White, 29 (7 Ired.), 180.

EVIDENCE.—Where the indictment alleges the publication of a libellous article charging the prosecutor, a magistrate, with malversation and corruption in office, evidence of other acts of official misconduct by the prosecutor is incompetent. Lyon, 89—568.

In such case the official character of the magistrate may be proved by parol. Ibid.

A witness, in such case, may be allowed to refresh his memory by reading the paper containing the libellous article, and may then say that he saw the article in that paper soon after its publication, though he has no recollection of the article apart from the paper. Ib.

INDICTMENT.—If the libellous matter in a production be not direct, but only libellous by allusion or reference, the fact understood must be stated

by introduction, and must be pointed at by explanatory inuendoes. Neese, 4 (Taylor's Term Rep.), 691.

VARIANCE.—Defendant published a card concerning the prosecutor charging him with giving false testimony in order to manufacture public sentiment in his favor, which concluded by saying that that which made the prosecutor depose falsely on the witness stand "*is the cause of all this muss.*" The indictment omitted the word "all" preceding the words "this muss": *Held*, that the variance was fatal. Townsend, 86—676.

Where the indictment alleges the setting up in public of a board on which was a painting or picture of a human head, with a nail driven through the ear and a pair of shears hung on the nail, and the proof is that a human head, showing a side face with an ear, a nail driven through the ear and a pair of shears hung on the nail, was inscribed or cut in the board by means of some instrument, but was not painted, the variance is fatal. Powers, 34 (12 Ired.), 5.

CHARGE.—Where the indictment sets forth the publication to the effect that defendant published a card in which he stated that he went on the prosecutor's premises for the purpose of searching for stolen property, and that he found it in one of the prosecutor's houses, *without averring that defendant thereby intended to charge the prosecutor with stealing his property*, it is error to leave it to the jury to say whether such an interpretation should be given to the publication as that it charged a larceny of the property against the prosecutor. White, 28 (6 Ired.), 418.

EVIDENCE—CORROBORATION.—On the trial of a defendant for libel in charging that the prosecutor was a negro living in adultery with a white woman as his wife, testimony that the prosecutor had associated with white men as a white man was competent to prove that he was a white man, either as corroborative or substantive evidence. Sherman, 115—773.

PUBLICATION—WHAT IS.—A libellous letter written by one in this state, who procures another in this to copy, read and mail it to the prosecutor in another state, is published in this state. McIntire, 115—769.

LICENSE TAX.

Sec. 392 (3704). Penalty for practicing a trade, profession or franchise, without having obtained a license. 1876-'7, c. 156, s. 31.

Every person who shall practice any trade or profession, or use any franchise, taxed by law, without having first paid the tax and obtained a license as required, shall be guilty of a misdemeanor, and shall forfeit and pay to the state a penalty not exceeding twenty dollars, at the discretion of the court, and in default of the payment of such fines, he may be imprisoned for not more than thirty days, at the discretion of the court for every day on which he shall practice such trade or profession, or use such franchise, except in such cases where the penalty is otherwise specially provided; which penalty the sheriff shall cause to be recovered before any justice of the peace of the county.

MANUFACTURER OF LUMBER.—One who carries on the business of buying timber and converting it into lumber for sale is a manufacturer, and not a trader, within the meaning of the above section, nor within the meaning of the revenue act requiring merchants and "other traders" to pay a privilege or purchase tax. A trader is one who sells goods substantially in the form in which they are bought, and who has not converted them into another form of property by his skill and labor. Chadbourn, 80—479.

JURISDICTION.—The punishment for a violation of the above section is limited to a fine not to exceed twenty dollars, or imprisonment not to exceed thirty days, and the offence created by the statute is therefore cognizable before a justice of the peace. Clarke, 85—555.

THE PENALTY.—In addition to the punishment by fine or imprisonment the person violating this section is liable to a penalty not to exceed twenty dollars for every day the trade or profession shall be practiced, to be recovered before a justice of the peace in an action to be brought by the sheriff. Clarke, 85—555.

JUSTICE CAN NOT IMPOSE PUNISHMENT OF IMPRISONMENT IN THE ACTION FOR THE PENALTY.—Where the sheriff institutes an action for the penalty before a justice of the peace, the justice can not, in the same action, pronounce a judgment of imprisonment, since imprisonment for debt is abolished in this state except in cases of fraud. Clarke, 85—555.

INDICTMENT.—It is not necessary that an indictment for a violation of the above section should allege that the offence was committed more than twelve months before the finding of the bill, since this is a matter of defence to be proved on the plea of not guilty. Clarke, 85—555.

The fact that such trade or occupation exercised in this state is carried on in goods, wares or merchandise which had their origin out of the state can not make it "interstate commerce." French, 109—.

The exception in the revenue act of 1891 as to "purchases of farm products from the producer" does not discriminate against products brought from other states, but simply exempts purchases of farm products from the producer, wherever raised, from being taken into account in ascertaining the basis upon which the license tax is graduated. Stevenson, 109—.

The fact that the license tax is graduated by the amount of the merchant's purchases of a certain class of goods, that is, goods not the products of the farm purchased from the producer, and not by the amount of his total purchases, is not imposing unequal taxes on the goods in violation of Const. N. C., art. 5, sections 5, 6, which require uniformity of taxation. Stevenson, 109—.

One who buys farm products in this state, but not from the producer, and sells the same in this state without paying the license tax required is guilty of a violation of the act. Stevenson, 109—.

DEALERS IN SEWING MACHINES—CONSTITUTION.—One who sells sewing machines in this state without first having obtained a license therefor, and without having paid the license tax required for the privilege of exercising such occupation, such machines having been manufactured in another state and shipped to the seller on his own account, is guilty of a violation of the revenue act of 1889 (Laws 1889, c. 216, sec. 25), requiring dealers in sewing machines to pay a tax of \$250 and obtain a license before engaging in such business. Wessell, 109—.

The revenue act of 1889 imposing a license tax on dealers in sewing machines is not unconstitutional as in violation of the constitution of the United States providing that congress has power to "regulate commerce

among the states." There is no tax laid on the dealings between the foreign manufacturer and the defendant; but the tax is laid on the occupation the defendant is engaged in of selling sewing machines to parties in this state, and it makes no difference whether he has previously obtained the machines from a manufacturer within the state or out of it. Wessell, 109—.

TAX ON LIVERY-STABLES.—A tax imposed by municipal government on keepers of livery-stables is not a tax on property, but a tax on occupations or vocations, and is not unconstitutional as being in disregard of the principle of uniformity. Powell, 100—525.

LICENSE TAX IMPOSED BY TOWNS AND CITIES.—The power conferred in a town charter to license persons for the privilege of carrying on trades and to require a price therefor is a police power, but does not give the right to use the license as a mode of taxation for revenue in the absence of a clear intent in the charter. Bean, 91—554.

MERCHANT'S PURCHASE TAX—CONSTITUTION.—There was a special verdict finding that defendants, who were merchants residing in this state, purchased goods and merchandise in other states, which were not farm products, and brought the same into this state and there sold large quantities of such goods and merchandise; that defendants made no purchases of goods, wares or merchandise of any kind within this state; that all of the purchases so made by them out of the state were of articles not specially taxed by the revenue act of 1891, and that defendants did not make any statement of the amount of their purchases out of the state as required by the revenue act: *Held*, that defendants were guilty under Laws of N. C., 1891, c. 323 sec. 22, requiring merchants who buy and sell goods and merchandise not specially taxed to pay, in addition to the *ad valorem* tax upon their stock, a license tax of one-tenth of one per centum on the total amount of their purchases in or out of the state, except purchases of farm products from the producer. French, 109—.

Such tax is not a property tax, but is a license tax for the privilege of carrying on the business specified, and is expressly authorized by Const. N. C., art. 5, sec. 3, providing that the general assembly may tax trades, professions, franchises and incomes. French, 109—.

Nor is this mode of taxation forbidden by the fourteenth amendment of the constitution of the United States, which guarantees to all persons the equal protection of the laws. This amendment does not affect the right of a state to adjust its system of taxation in accordance with its own constitution. French, 109—.

Such license tax is not void as being in violation of the Federal Constitution, art. 1, sec. 8, which gives to congress the power "to regulate commerce with foreign nations and among the several states." Interstate commerce is confined to "interstate dealings," such as the offering for sale or selling goods in one state to be shipped to the buyer who is in another state, or a tax on the transportation of passengers or freight from one state to another; and the tax imposed on merchants by the revenue act of 1891 is not on any dealings between parties outside of the state and merchants within the state, but the "business" taxed is that of carrying on a mercantile business *in the state*. French, 109—.

One who, while in the employment of another, with a wagon and team and a sample range, exhibited his samples to another in this state and solicited his order for a range similar to the sample, to be delivered in thirty days, the exhibition not being made either in the street or in a house temporarily rented for the purpose of exposing to sale goods, wares and merchandise, is not indictable for failure to pay the license imposed either upon peddlers by section 28 of the revenue act of 1893, or upon itinerant salesmen by section 23 of said act. Gibbs, 115—700.

UNIFORMITY REQUIRED.—Uniformity, in its legal and proper sense, is inseparably incident to the power of taxation, whether applied to taxes on property or to those imposed on trades, professions, etc. Moore, 113—697.

LIGHTNING-RODS.—Defendant was the agent for the sale and delivery in this state of manufacturers of lightning-rods in another state, and such sale and delivery included the putting up of said rods whenever the purchaser so requested, for which no extra charge was made. The rods were shipped in bulk to the agent who broke the package for distribution to his customers: *Held*, that defendant was an itinerant, putting up lightning-rods within the meaning of the revenue act; that the connection between the pursuit of such avocation and the sale of articles manufactured in another state was so remote in its effect as to impose no burden upon the business of interstate commerce; that the breaking of the original packages before the sale and delivery divested the transaction of any feature of interstate commerce. Gorham, 115—721.

GOODS MANUFACTURED IN ANOTHER STATE.—The right of a state to tax trades, professions and avocations within the borders of the state is unquestionable, though the goods dealt in be manufactured in another state. Gorham, 115—721.

UNREASONABLE TAX—VOID.—A statute imposing a license fee of \$1,000 for carrying on the business of an "emigrant agent," there being no regulation of such occupation, and therefore no expense in supervising it, is void for unreasonableness of the license fee; and besides the large license fee being prohibitory of the business the statute is void as an exercise of police power. Moore, 113—697.

LIMITATIONS.

Sec. 393 (1177). Indictment for misdemeanor to be commenced in two years, exceptions thereto. R. C., c. 35, s. 8. 1826, c. 11.

All misdemeanors, except the offences of perjury, forgery, malicious mischief, and other malicious misdemeanors, deceit, and the offence of being accessory after the fact, now made a misdemeanor, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards: *Provided*, that in case any of the said misdemeanors, hereby required to be presented within two years, shall have been committed in a secret manner, the same may be prosecuted within two years after the discovery of the offender: *Provided further*, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offence, within one year after the first shall have been abandoned by the state.

INDICTMENT WITHOUT PRESENTMENT.—An indictment prepared by the solicitor and sent to the grand jury, no presentment having been made, is not a presentment, and where such bill for a misdemeanor was sent

and an investigation begun, but continued for want of material witnesses, the grand jury returning the bill with that indorsement into court with their presentments, and at a subsequent term, but more than two years after the commission of the offence, the bill is sent to another grand jury and returned a true bill, the prosecution is barred. *Morris*, 104—837.

SLANDER.—The slander of an innocent woman being a malicious misdemeanor, is not within the operation of the statute of limitations. *Claywell*, 93—731.

BURDEN OF PROOF.—It is incumbent on the state to prove that the offence was committed within two years before indictment found. *Carpenter*, 75—230.

SECOND BILL AFTER PLEA IN ABATEMENT.—Where, after a successful plea in abatement, a second bill is sent, the second bill is but a continuation and part of the former proceeding, and the prosecution is not barred because more than two years elapsed since the commission of the offence and before the finding of the second bill. *Hailey*, 51 (6 Jones), 42.

OFFENCES COMMITTED IN A SECRET MANNER.—On indictment for marrying a female under fifteen years of age, proof that the marriage was by consent of the mother and was solemnized by a minister in the presence of six or seven persons, and that the parties afterwards lived together openly as man and wife, will protect defendant from the operation of the proviso in case the offence is committed in secret. *Watts*, 32 (10 Ired.), 369.

PRESENTMENT PREVENTS THE STATUTE FROM RUNNING.—A presentment is the commencement of a prosecution and prevents the statute from running. *Cox*, 28 (6 Ired.), 440.

PUBLIC HIGHWAY—OBSTRUCTION.—This statute has no application to indictments for obstructing a public highway by putting up a house thereon, since the offence is a continuous one. *Long*, 94—896.

ABANDONMENT.—Abandonment is not a continuous offence, and an indictment found more than two years after the act of abandonment is barred by the statute of limitations. *Brown*, 67—470.

ABATEMENT OF NUISANCE.—No length of possession can operate as a bar to an abatement of a nuisance on behalf of the public. *Holman*, 104—861.

SEDUCTION.—The exemption from the two years limitation applies to the offence of seduction, since deceit is the very essence of the offence. *Crowell*, 116—1052.

INDICTMENT NEED NOT ALLEGE TIME.—It is not necessary to allege that the two years had not expired before bringing the indictment. *Watts*, 32 (10 Ired.), 369.

OTHER TIME PROVED.—The state, on a trial for a misdemeanor, is not restricted to the time stated in the indictment, but may prove any act of the defendant committed within two years before the legal presentment of the offence. *Newsom*, 47 (2 Jones), 173.

WARRANT.—The taking out of a warrant, which was dismissed at the hearing, does not prevent the bar of the statute. *Mason*, 66—636.

INDICTED UNDER WRONG NAME.—An indictment against a person by a wrong name which is pleaded to in abatement and the plea found for defendant, is nevertheless the same cause of action, and the lapse of two years is no bar to the prosecution. *Hailey*, 51 (6 Jones), 42.

BASTARDY.—This section does not apply to a bastardy proceeding, as such proceeding is controlled by section 36 of The Code. *Hedgepeth*, 122—1039. *Perry*, 122—1043.

Bastardy is an exception to the general provisions of the statute, and as to that offence the special limitation of three years applies. *Perry*, 122—1043.

LIQUOR SELLING.

Sec. 393 (1076). Liquor selling, retailing without license. R. C., c. 34, s. 94. 1825, c. 1272, s. 5. 1874-'5, c. 39. *Passim*, 1798, c. 501. 1816, c. 906.

If any person shall retail spirituous liquors by the small measure in any other manner than is prescribed by law, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court.

WHAT CONSTITUTES A SALE.—Where defendant, having a license to sell not less than a quart, allows a witness to go to a barrel of whiskey when he pleases and draw a drink until he considers he has been paid a debt of \$1.25, he is guilty of selling by the measure less than a quart. *Poteet*, 86—612.

A statute made it a misdemeanor to sell liquor within four miles of a certain locality, and defendant who had a still without the territory agreed with a party within the territory to sell him liquor, which was also delivered within the four miles: *Held*, that there was a sale within the four miles, and the defendant was guilty. *Sykes*, 104—694.

A club distributed liquors which were on hand to certain of its members who placed them in the hands of defendant, who was their steward, to be held by him, not for the club as a club, but for those individual members of the club as tenants in common, the share of each not being kept separately, but mingled in the same jars, casks and demijohns. From time to time, as each of those members wished, he obtained drinks from the defendant for himself and friends, paying therefor in money, or giving tickets to be afterwards redeemed in money, as near as may be the cost price of the drinks so furnished, and with the money the defendant from time to time replenished the stock of liquors: *Held*, that there was a sale. *Following State v. Lockyear*, 95—633. *Neis*, 108—787.

An agreement to deliver to the purchaser, from time to time, liquors in parts of a quart as he should call for them, with an engagement on his part to take, in the whole, a quart in quantity, and an engagement on the part of the seller not to exact payment until that quantity should be received, constitutes the seller a retailer by the small measure. *Kirkham*, 23 (1 Ir.), 385.

Defendant received at his home and place of business, in this state, in a territory within which the sale of whiskey is prohibited, an order from a person living in another state for a certain quantity of whiskey at an agreed price, and in pursuance of such order delivered the whiskey at a railroad station, also within the prohibited territory, for shipment to the purchaser at his home in the other state: *Held*, that the transaction was a sale of whiskey within the prohibited territory, and the question of interstate commerce does not affect the guilt or innocence of the defendant. *Groves*, 121—632.

A liquor dealer is criminally responsible for the unlawful sale by his agent of liquors to minors, though such sale may have been against his instructions and without his knowledge. *Kittelle*, 110—560.

TRICK—DEVICE.—A witness testified that he applied to defendant for liquor; that defendant said he could not get it unless he had a bottle; witness gave him a bottle and a small sum of money, and defendant went off, and in a short while returned with a bottle of whiskey, and said he

charged a small sum for getting it, which was paid: *Held*, error to charge that if the jury believed the evidence defendant was guilty, without further telling them to consider the *bona fides* of the transaction. Taylor, 89—577.

Defendant had a room in which was a table with a hole in the top, and a decanter of liquor and tumblers were on the table. Witness at sundry times went into the room, poured out a drink and took it, dropped a nickel in the hole for each drink, defendant being present and nothing said between him and the witness: *Held*, that the court properly charged that if the jury believed that the liquor belonged to defendant, and that he received the money for it, and that this was simply a device to evade the law, he would be guilty. McMinn, 83—668.

The prosecuting witness sent for some whiskey by defendant, gave defendant some money and told him to bring him some whiskey, which he did, and nothing was paid defendant for bringing it: *Held*, that the transaction was *prima facie* a sale, and the burden was on defendant to show, if he could, that he was acting as the agent of the prosecuting witness, or that the sale was otherwise legal. Smith, 117—809.

INDICTMENT.—An indictment, containing only one count, which charges several distinct offences, is bad for duplicity, and a demurrer or motion to quash will be sustained, but if a *noi pros.* is entered as to all but one charge, and defendant goes to trial and is convicted the defect is cured. Cooper, 101—684.

An indictment for selling "intoxicating liquors" is sufficient without specifying the particular kind of liquor. Packer, 80—439.

An indictment under Laws 1887, c. 135, sec. 35, for selling liquors in quantities greater than a quart should negative the facts that the spirits were of defendant's own manufacture, or were sold at the place of manufacture, or were the product of his own farm. Approving *State v. Whisenhunt*, 98—682. Dalton, 101—680.

An act prohibiting sales within a certain distance of an academy is a public local statute, and need not be pleaded in the indictment. Wallace, 94—827.

Where a statute makes it indictable to sell liquor within two miles of a certain place, but the act is not to go into operation until an election is held, an indictment under the act must aver that such election has taken place. Chambers, 93—600.

Where a statute simply provides that it shall be "unlawful" to sell whiskey within a certain territory, a violation of its provisions is indictable at common law. If a statute prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions in violation of its provisions being misdemeanors at common law, are indictable and punishable, if the statute prescribes no mode of proceeding. Parker, 91—652.

Where the indictment, under Laws 1885, c. 175, sec. 34, alleges that defendant sold by the measure "less than a gallon," and there is a special verdict finding that defendant sold "one gallon," the judgment must be arrested. The indictment is fatally defective for failure to specify the offence so as to show whether the charge is for a violation of the first or second paragraph of the act. Hazell, 100—471, and also Sutton, 98—474, same point.

If the legislature enacts a law in the terms of a former one, and at the same time repeals the former, this amounts to a re-affirmance of the former law, which it does not, in legal contemplation, repeal. Sutton, 100—474.

The indictment must allege a sale to some particular person or persons or to some person or persons to the jurors unknown. *Faucett*, 20 (4 D. & B.), 108.

It is not necessary that an indictment for violating a local prohibitory act should refer to the statute. *Snow*, 117—778.

A reference to the wrong act in the indictment is immaterial and mere surplusage. *Snow*, 117—778.

An indictment charging the violation of a certain section of a statute need not specify that the act charged does not come within an exception created in a subsequent section of the same statute. *Downs*, 116—1064.

It is not necessary for the indictment to refer to the statute prohibiting sales within a certain distance of a church, since the statute is a public local one, of which the courts will take judicial notice. *Downs*, 116—1064.

Where the indictment charges a sale within two miles of "Bethel Methodist church in Macon county," and the special verdict describes the church as "Bethel church in Macon county," the variance is immaterial. *Downs*, 116—1064.

It is not necessary to specify the kind of liquor sold, as that is a matter of evidence. *Downs*, 116—1064.

THE INTENT.—The intention with which an unlawful sale of liquor was made is immaterial. *Downs*, 116—1064.

INCONSISTENT STATUTES.—Where two statutes are inconsistent and irreconcilable the last will prevail though there is no repealing clause. *Monger*, 111—675.

ADVICE OF COUNSEL NO EXCUSE.—The unlawful sale of liquor is not excused by the fact that the defendant, acting under the advice of counsel, believed that the particular sale was not a violation of law. *Downs*, 116—1064.

TOWN INCLUDED IN PROHIBITED TERRITORY.—A law prohibiting the sale of intoxicating liquors within two miles of a certain church is valid, notwithstanding a part of the territory so specified is within the limits of a town whose charter had prior to such enactment empowered it to license liquor selling. *Snow*, 117—774.

DENTIST.—A dentist is not a physician within the meaning of this section, and his prescription for liquor for the toothache does not justify one in selling liquor on Sunday. *McMinn*, 118—1259.

WHAT IS SPIRITUOUS LIQUOR.—Liquor produced by running the beer through the still only once, commonly called "singlings," is spirituous liquor within the meaning of the law forbidding the sale of "spirituous liquors." 60 (1 and 2 Winst.), 108.

Where a liquor, by common knowledge or observation, is intoxicating, the court may so declare, but if it is doubtful whether it is intoxicating or not, then it is a question for the jury. *Scott*, 116—1012.

Where the evidence is that defendant drank four bottles of brandy peaches and became drunk thereby, it is for the jury to determine whether the liquor was spirituous and intoxicating. *Scott*, 116—1012.

COMMON KNOWLEDGE OF INTOXICATING QUALITY OF LIQUOR.—It is not error to refuse a motion for a new trial after verdict of guilty on an indictment for selling "intoxicating liquors" on the ground that defendant sold only port wine, and there was no evidence that it was intoxicating, since its intoxicating quality is a matter of common knowledge, and can be passed on by the jury without proof. *Packer*, 80—439.

EFFECT OF LICENSE.—Retailers are indictable for selling without a license obtained under the general law, notwithstanding they may have a license issued by the town commissioners under their town charter, which provides that the commissioners "shall have *full control* of the sale of spirituous liquors within the limits of said town." Propst, 87—560.

One licensed to sell in a certain town can not sell at more than one place in the town. Moody, 95—659.

A license to two persons as partners will protect one of them, though the other may have retired from the firm before it expired. Gerhardt, 48 (3 Jones), 178.

Where a private statute forbids a county court to issue license in a certain town without a recommendation from the commissioners of the town, a license issued without such recommendation will not protect from an indictment. Moore, 46 (1 Jones), 276.

GOVERNMENT LICENSE—EFFECT.—A government license for the sale of intoxicating liquors will not protect the holder thereof from prosecution by the state for selling in violation of state laws. Downs, 116—1064.

RETAILER—WHO IS.—The sale of liquors in quantities not less than a quart does not constitute the seller a "retailer." The Code, sec. 3701, prescribing how license to "retail" shall be obtained, only uses the words "in quantities *less than a quart*," and this provision of section 3701 has not been repealed or modified by the revenue act of 1889, c. 21, sec. 329, imposing the license tax for selling in quantities of five gallons *and less*, since the only effect of the act of 1889 is to make the tax for the license the same in amount for retailing as for selling by the quart and not exceeding five gallons. Newcomb, 107—900.

VARIANCE.—Defendant was indicted for selling within two miles of "Rocky Knoll" church under a statute designating the church by that name; the evidence was that it was generally called "Rocky Ridge," though a few persons called it "Rocky Knoll," and there was no other church in the county known by either name: *Held*, that the variance was immaterial. Patterson, 98—666.

JURISDICTION.—Under Laws 1887, c. 417, making it indictable to sell whiskey within two miles of Mud Creek Baptist church in Henderson county, and making the offender subject to fine and imprisonment in the discretion of the court, the superior court has jurisdiction. Hollingsworth, 100—535.

Where defendant was arrested on a warrant issued by a justice of the peace for a violation of Code sec. 2646, and after a preliminary hearing was bound over to the superior court, a motion by the state to remand the case to the justice for trial on the ground that he has exclusive original jurisdiction may be properly granted. Sykes, 104—700.

Laws 1887, c. 135, sec. 35 does not repeal Laws 1885, c. 175, sec. 34 in respect to the penalties therein imposed, nor do the two acts repeal or suspend the general statute (Code, sec. 1076) making it a misdemeanor to retail spirituous liquors without license, therefore the superior court has jurisdiction of such offence. Deaton, 101—728.

This section (The Code, sec. 1076) is not repealed or suspended by sec. 35, c. 294, laws of 1893, and the superior court has jurisdiction of the offence of retailing without license. Edwards, 113—653.

EFFECT OF REVENUE ACT.—The revenue act, allowing persons to sell *without license* liquors and wines of their own manufacture at the place of manufacture, or liquors and wines the products of their own farms, does not authorize the sale of such liquors and wines within a territory within which the sale of spirituous liquors is prohibited by a local statute.

That act simply regulates the subject of license to sell liquors, and in certain cases allows a sale without license, but does not repeal or affect local prohibitory statutes. Wallace, 94—827.

DRUGGISTS.—A druggist who, in good faith and with due caution, sells as a medicine, by the direction of a practicing physician, spirituous liquors in a quantity less than a quart is not indictable therefor. Wray, 72—253.

TOWN ORDINANCE.—A town ordinance making the sale of liquors within the town a nuisance and the seller guilty of a misdemeanor, in the absence of any special authority to prohibit sales in the town, is void as prohibiting a business allowed and regulated by the general law of the state, and as creating an offence embraced by the general law. Brittain, 89—574.

A prosecution for selling liquor without license, contrary to a city ordinance, is no bar to a prosecution by the state for the same act of selling without obtaining state license. Reid, 115—741.

The pendency of an indictment for selling liquor without license before a mayor, under an ordinance which lawfully confers jurisdiction on the mayor, does not conflict with a criminal action pending or that may be instituted against the defendant on account of such alleged selling as an act in violation of the general law of the state. Stevens, 114—873.

EXCLUSIVE PRIVILEGES—CONSTITUTION.—An act chartering an agricultural society which forbids any person not doing a regular business within half-mile of the grounds of the society from selling liquors, tobacco or other refreshments within that distance from said grounds, and making it a misdemeanor to do so, is not unconstitutional as granting exclusive emoluments or privileges, nor as to perpetuities and monopolies. Stovall, 103—416.

PLACE OF MANUFACTURE.—A sale made at defendant's dwelling-house, some 200 yards from the place of manufacture, is not made at the "place of manufacture" within the meaning of Revenue Laws 1885, 1887. Whisenhunt, 98—682.

FORMER ACQUITTAL.—Where an indictment charges selling to "some person to the jurors unknown," and defendant is acquitted on the ground that the retailing was to J S and not to one unknown, and he is again indicted for retailing to J S, the plea of *autrefois acquit* is no bar to the second indictment, since the facts charged in the second would not have supported the first indictment. Birmingham, 44 (Busb. Law), 120.

An acquittal on an indictment charging a sale to A will not sustain this plea to an indictment charging the sale to B. Williams, 94—891.

ESTOPPEL.—The doctrine of estoppel does not apply to the state; therefore, where in one indictment for selling liquor within five miles of a church, it was found that the place where the liquor was sold was more than five miles from the church, this does not estop the state from proving in another indictment that the same place was less than five miles from the church. Williams, 94—891.

SPECIAL VERDICT.—A recital in the record, upon the return of a special verdict "that the court being of opinion that upon this state of facts the defendant is not guilty, the verdict is so entered," is not such a judgment as will support an appeal. Hazell, 95—623.

Where the record recites that "upon the facts found in the above special verdict the judge being of opinion that the defendant is not guilty, so adjudged, and from this verdict the solicitor for the state appealed," the appeal must be dismissed, because the appeal is not from a judgment rendered on the verdict. Smith, 95—680.

Where the special verdict sets out that defendant sold spirituous

liquors within two miles of a certain school house, and the act under which defendant is indicted forbids any person from erecting a stand or place of business for the purpose of offering for sale spirituous liquors. the defendant is not guilty. *Somers*, 111—685.

ELECTION.—Where the bill contains more than one count and the solicitor elects to try on only one, such election is equivalent to a verdict of not guilty on the others. *Sorrell*, 98—738.

ARREST OF JUDGMENT.—An indictment contained two counts, one for selling whiskey in violation of the local option law, and the other for selling without license. There was proof of the sale, and it was admitted that at the time of the sale local option prevailed in the town, but that at the time of the trial local option did not prevail by reason of an election held since the sale resulting in favor of license. There was a general verdict of guilty: *Held*, that the effect of local option was not to suspend the license law, and that a motion in arrest of judgment was properly denied, since judgment could be given on the count for retailing without license. *Smiley*, 101—709.

The supreme court can not take judicial notice of the fact that the local option law prevails in a town, and where the bill charges that an illegal sale took place in the county, a motion in arrest of judgment on the ground that local option prevailed in the town where the offence was in fact committed, and that therefore the offence charged could not be committed there, can not be sustained. *Sorrell*, 98—738.

Where the indictment is for selling "within five miles" of a certain church under an act prohibiting such sales within five miles of the place, and pending the prosecution a new act is passed limiting the distance to "two miles," the judgment will be arrested. *Williams*, 97—455.

MOTION TO QUASH.—On indictment for selling whiskey without a license, a motion to quash on the ground that a magistrate had exclusive original jurisdiction under Laws 1887, c. 135, sec. 35, may be properly denied, since, if the sale took place within six months before the finding of the bill, defendant could have the benefit of the point under the plea of not guilty. *Dalton*, 101—680.

EVIDENCE.—Evidence elicited on cross-examination that the prosecuting witness said he intended to "break up" defendant, may be explained, and the witness allowed to testify that he made the assertion because he thought the grog-shop an injury to the community, and that, from what he saw himself, the defendant was an improper person to have license. *Glenn*, 95—677.

EVIDENCE—BURDEN ON DEFENDANT TO SHOW LICENSE.—On the trial of an indictment for retailing, the burden is on defendant to show a license. *Following State v. Morrison*, 3 Dev., 299. *Emery*, 98—668.

It is incumbent on defendant to show the existence of a license. *Morrison*, 14 (3 Dev.), 299.

AMBIGUOUS ACT.—Where the statute prohibits the sale of whiskey "within three miles of Mt. Zion church" in a certain county, and it appears on the trial of an indictment for its violation that there are two churches of that name in the county, the act is ambiguous and inoperative. *Partlow*, 91—550.

In such case neither a member of the legislature nor any other person is competent to testify as to which church it has reference. *Ib.*

PUNISHMENT.—One convicted of unlawful liquor selling may be punished under Laws 1887, c. 355, by imprisonment at hard labor on the public roads, and where such judgment has been rendered it will be presumed

that the county authorities have made the necessary provisions under the statute for working convicts on the public roads. Hicks, 101—747.

PRODUCTS OF FARM.—Tolls received from a mill erected on the farm are not such "*products of his own farm*" as are excepted in Laws 1887, c. 135, sec. 31, and one may be convicted of selling without license when the spirits sold were the "*products of his own farm*" *mixed* with such toll. Kennerly, 98—657.

LICENSE VOID.—Where the commissioners order license to issue to defendant, but on the same day revoke the license, and defendant has notice of both orders, a license subsequently given by the sheriff is no protection to defendant on indictment for retailing. Voight, 90—741.

An act authorizing the granting of license to sell at "Nag's Head Hotel" does not embrace "Nag's Head" as a locality, and a license to sell at a place in the territory known as "Nag's Head" some 250 yards from "Nag's Head Hotel," is void. Moody, 95—656.

SELLING ON SUNDAY.—A licensed retail liquor dealer is indictable for selling on Sunday, without a prescription, though the whiskey be bought for and used by a sick person, and defendant is so informed at the time of the sale. Wool, 86—708.

Evidence that the sale was made on Sunday is sufficient, though the witness may be unable to state in what month the Sunday came on. Bryson, 90—747.

Where a witness for the state testifies that he went to defendant's restaurant as a spy for the police officer and for the purpose of making a case against the defendant, it is not error to refuse an instruction that it would be unsafe to convict upon the unsupported testimony of such witness, but in such case it is proper to charge that the jury should scrutinize his testimony, and if, after doing so, they believe it to be true it makes no difference what his motive was in going to the restaurant. Black, 121—578.

An indictment charging the commission of the offence on Sunday, though it names the day of the month which does not fall on Sunday, is sufficient, and may be supported by proof of its commission on a Sunday. Bryson, 90—747.

Sec. 394 (1077). Liquor selling to minors forbidden. 1873-'4, c. 68. 1881, c. 242.

It shall be unlawful for any dealer of intoxicating drinks or liquors to sell, or in any manner to part with for a compensation therefor, either directly or indirectly, or to give away such drinks or liquors, to any unmarried person under the age of twenty-one years, knowing the said person to be under the age of twenty-one years: *Provided*, that such sale or giving away shall be *prima facie* evidence of such knowledge. Any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit, shall be considered a dealer within the meaning of this section. And any person violating this section shall be guilty of a misdemeanor.

MINOR DRINKING WITH AN ADULT.—A liquor seller who supplies liquors to a minor to drink at the request of an adult who pays the price and drinks with him, is guilty of selling to the minor. Best, 108—747.

SALE BY PARTNER OR CLERK.—Where one partner is present and sees the other partner sell to a minor, or either or both permit a clerk to do the same thing in their presence, an indictment will lie against both or either who may be present, just as though he had actually delivered the drinks. Scoggins, 107—959.

SON BUYING FOR FATHER.—Where a father sends his minor son to buy whiskey for him, and the dealer delivers the whiskey to the son knowing it was for the father, the dealer is not guilty of selling to a minor. Walker, 103—413.

ACCESSORIES.—One who induces a liquor seller to furnish liquor to a minor, and who pays for the liquor himself, is guilty as an aider and abettor of the dealer. Best, 108—747.

PERMISSION OF MINOR'S FATHER.—One who sells to an unmarried minor is guilty, notwithstanding the father of the minor gave the dealer permission to sell to his son. Lawrence, 97—492.

SELLER PRESUMED TO KNOW AGE.—The seller is presumed to know that the person to whom he furnishes the liquor is a minor. Scoggins, 107—959.

DEMURRER TO EVIDENCE.—Where the evidence is that the person to whom the liquors were charged to have been sold was eighteen years old, and his appearance clearly indicates such fact; that he repeatedly within the last two years went to defendant's bar-room with an adult acquaintance, to whom he had given the money to purchase liquors before entering the bar; that the adult would call for the drinks and pay for them, and the defendants would pour out the drinks and hand them to the minor and adult, a demurrer to the evidence for that it does not show that both defendants participated in any one sale, is properly overruled, and it is proper to charge that if the jury believe the evidence defendants are both guilty. Scoggins, 107—959.

SELLING ON PHYSICIAN'S CERTIFICATE.—A liquor dealer who sells by the quart on a physician's certificate, without having a license to sell by the quart, is guilty, though he honestly believe the whiskey was to be used for medicinal purposes. Distinguishing State v. Wray, 72—253. Dalton, 101—680.

PHYSICIAN AND DRUGGIST A DEALER.—A practicing physician who keeps whiskey for sale in his drug store is a "dealer" within the meaning of the statute, and may be convicted for prescribing for and selling to a minor such liquors as a medicine, notwithstanding he acted in perfect good faith. Davis, J., dissenting. McBrayer, 98—619.

The general law (Code, sec. 1077) is not affected by Laws 1876-77, c. 133, and Laws 1873-4, prohibiting the sale of liquors in the town of Shelby, except by "practicing physicians and for medicinal purposes only." Ibid.

Sec. 395 (1078). Liquor selling to minors; the father, mother, guardian and employer of minor may sue liquor dealer for damages. 1873-'4, c. 68. 1881, c. 242, s. 2.

The father, or if he be dead, the mother, guardian or employer of any minor to whom a sale or gift shall be made in violation of the preceding section, shall have a right of action in a civil suit against the person or persons so offending by such sale or gifts, and upon proof of such illicit sale or gifts, shall recover from such party or parties so offending, such exemplary damages as a jury may assess: *Provided*, that such assessment shall not be less than twenty-five dollars.

Sec. 396 (1079). Liquor selling within two miles of public political speakings prohibited. 1879, c. 212.

It shall be unlawful for any person to sell or to give away, either directly or indirectly, any spirituous liquors, wine or bitters containing alcohol, within two miles of any place at which political public speaking shall be advertised to take place, and does take place, this prohibition to continue only during the day on which said public political speaking shall take place. And any person who shall violate this section shall be guilty of a misdemeanor, and fined not less than ten dollars nor more than twenty dollars, or imprisoned not exceeding twenty days. Justices of the peace shall have original jurisdiction of this offence, upon view, or written information duly sworn to.

Sec. 397 (982). Adulterated liquors, penalty for making or selling. 1858-'9, c. 57, ss. 1, 4.

If any person shall adulterate any spirituous, alcoholic, vinous or malt liquors by mixing the same with any substance of whatever kind, except as hereinafter provided, or if any person shall sell or offer to sell any spirituous, alcoholic, vinous or malt liquors, knowing the same to be thus adulterated, or shall import into this state any spirituous or intoxicating liquors, and sell or offer to sell such liquor, knowing the same to be adulterated, he shall be guilty of a misdemeanor, and fined and imprisoned, or both at the discretion of the court.

Sec. 398 (983). Adulterated and poisonous liquors, penalty for manufacturing or selling. 1873-'4, c. 180, ss. 1, 2.

Any person who shall manufacture, sell, or in any way deal out spirituous liquors of any name or kind, to be used as a drink or beverage, and the same shall be found to contain any foreign properties or ingredients poisonous to the human system, shall be guilty of a high misdemeanor, and imprisoned in the penitentiary not less than five years, and may be fined in the discretion of the court. It shall be competent for any citizen after making purchase of any spirituous liquors, to cause the same to be analyzed by some known competent chemist, and if upon such analysis it shall be found to contain any foreign poisonous matter it shall be *prima facie* evidence against the party making such a sale.

Sec. 399 (984). Adulterating liquors, penalty for selling recipes for. 1858-'9, c. 57, ss. 2, 3.

Any person who shall sell or offer to sell any recipe or formula whatever for adulterating any spirituous or alcoholic liquors, by mixing the same with any substance of whatever kind, except as

hereinafter provided, shall be guilty of a misdemeanor, and fined and imprisoned as is provided in the preceding section: *Provided*, that this section and the two preceding sections shall not be so construed as to prevent druggists, physicians, and persons engaged in the mechanical arts, from adulterating liquors for medical and mechanical purposes.

Sec. 400 (2740). Intoxicating liquors not to be given away or sold on day of election. 1868, c. 28, ss 1, 2.

Any person who shall give away, or sell, any intoxicating liquors except for medical purposes and upon the prescription of a practicing physician, at any place within five miles of the polling place, at any time within twelve hours next preceding or succeeding any public election, whether general, local or municipal, or during the holding thereof, shall be guilty of a misdemeanor, and fined not less than one hundred, nor more than one thousand dollars.

INDICTMENT.—An indictment for selling on election day must give the name of the person to whom the liquor was sold or given. *Stamey*, 71—202.

An indictment charging a sale “on and during a public election day” is defective, since the statute only makes it indictable to sell *during* election day, and it is not an offence to sell or give away liquor *on election day* if for any good cause no election is held. *Stamey*, 71—202.

The indictment must negative the selling upon “the prescription of a practicing physician and for medical purposes.” *Ib*.

FINDING BOTTLE AND GIVING TO ANOTHER.—One who casually finds a bottle of whiskey and passes it to another who drinks of it is guilty of a violation of the act. *Gibson*, 121—680.

THE INTENT.—It is not necessary that the selling or giving away any liquor on election day shall be with the intent to influence any voter or with any intent. *Gibson*, 121—680.

Sec. 401 (3440). Spirituous liquors forbidden to be sold within the penitentiary. 1873-'4, c. 158, s. 11.

Any person who shall bring into or sell within the penitentiary enclosure any spirituous liquors, not authorized by the physician for the use of the hospital, and every overseer, guard or officer employed in or about the prison, who shall suffer it knowingly to be brought in or sold, contrary to this section, shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days, and if an officer or employee of the institution, he shall be dismissed.

Sec. 402. Charitable and penal institutions, unlawful to give or sell liquor to inmates. 1885, c. 386.

It shall be unlawful for any person to sell or give except for medical purposes, and upon the prescription of a physician, any

intoxicating drink to any inmate of any of the penal or charitable institutions of this state.

Any person violating this act shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned at the discretion of the court.

LOCAL OPTION, LIQUORS AND WINE.

Sec. 403 (3110). The manufacture of domestic wines encouraged. 1874-'5, c. 208.

All wines made from grapes, blackberries, currants, gooseberries, raspberries and strawberries, manufactured in this state from fruit raised in the state, may be sold in bottles corked or sealed up, and not to be drunk on the premises, in any quantity whether greater or less than one quart. *Provided*, nothing herein shall authorize any person to sell any of the said wines to any person who is a minor; but this section shall not apply to wines which contain any foreign admixture of spirituous liquors, and shall only apply to such wines as derive their ardent spirit from vinous fermentation.

Sec. 404 (3111). Local prohibitory laws, or acts repealing such laws, not to be passed without notice. 1874-'5, c. 158, s. 1.

Notice of all applications to the general assembly to prohibit the sale of spirituous liquors, or to repeal any law prohibiting the sale of spirituous liquors, within the limits specified, shall be posted at four public places within the specified limits for at least thirty days before said application or petition shall be forwarded to the general assembly, and evidence that notice has been posted as required shall accompany the petition.

Sec. 405 (3112). The question of prohibition in certain localities to be decided by a vote of the people. 1874-'5, c. 158, s. 2.

In all cases where prohibition is asked for a greater distance from a common centre than two miles, the question shall be decided by the qualified voters of the interested district at an election held according to this chapter.

Sec. 406. When election held; exceptions. 1898, c. 551.

SECTION 1. It shall be the duty of the board of commissioners of any county upon petition of one-third of the number of votes

cast at the preceeding general election (said petitioners being registered voters) of any county, city, town or township in their respective counties to order an election to be held in August to ascertain whether or not intoxicating liquors may be sold in said county, city, town or township: *Provided*, that hereafter such elections shall not be held oftener than once in two years in any one county, city, town or township, nor shall such election be held in the years during which a general election is held: *Provided further*, only one election can be held in any county in said month of August.

SEC. 2. All laws and parts of laws in conflict with the foregoing section are hereby repealed: *Provided*, that nothing in this act shall be construed to permit the sale of intoxicating liquors in any county, municipality or locality where there is already prohibition, or to permit the holding of such election in any county, city, town, township or locality where the sale of intoxicating liquors is now prohibited by any special act of the legislature: *Provided*, that nothing in this act shall apply to the counties of Brunswick, Cleveland, Martin, Gaston, Washington, Davie, Mitchell, Jones, Anson, Beaufort, Transylvania, Camden, Polk, Haywood, Mecklenburg, Cherokee, Clay, Jackson, Wayne, Pender, Alexander, Montgomery, Hertford, Lincoln, Craven, Henderson, Gates, Madison, Stokes, Davidson, Cabarrus, Randolph, Surry, Buncombe, Perquimans, Graham, Macon, Swain, Johnston, Duplin, Catawba, Wilkes, nor to the town of LaGrange, Lenoir county: *Provided further*, that no election on prohibition shall be held in Person county until after January, nineteen hundred and one.

Sec. 407 (3114). Rules for holding election. 1873, c. 138. 1887, c. 215. 1889, c. 375.

Such county, town or township election, when so ordered, shall be under the same rules and regulations as prescribed for holding elections for members of the general assembly so far as the same may be applicable, and the returns made to the board of county commissioners, who shall meet at eleven o'clock on the Wednesday following said election, and who shall canvass the returns of the same, have record of the result entered upon their minutes, and declare the result in the same manner as is now required by the boards of county canvassers in elections for members of the general assembly.

Sec. 408 (3115). Who allowed to vote. 1873-'4, c. 138.

Any person allowed to vote for members of the general assembly shall have the right to vote at such elections at the place where

he is allowed to vote, and every such voter who favors the prohibition of the sale of spirituous liquors in the county, town or township as the case may be shall vote a ticket on which shall be written or printed the word "Prohibition," and every such voter who favors such sale shall vote a ticket on which shall be written or printed the word "License."

Sec. 409 (3116). The effect of the election in favor of prohibition. 1873-'4, c. 138. 1876-'7, c. 221. 1881, c. 359. 1887, c. 215.

If the majority of the votes cast at any such election in any city, county, town or township shall have written or printed thereon the words "*no license*" it shall not be lawful for the board of commissioners of such county to grant license to any person for the sale of spirituous, vinous or malt liquors or for any person to sell any spirituous, vinous or malt liquors, within such county, city, town or township until another election shall be held reversing such election: *Provided*, that liquor dealers holding license shall be allowed six months in which to close out their business if their license shall so long remain in force. If any person shall sell any spirituous, vinous or malt liquors within such city, county, town or township in violation of the provisions of this section the person so offending shall be guilty of a misdemeanor, and fined or imprisoned or both at the discretion of the court.

DOMESTIC WINES.—Although the provision in regard to domestic wines may be unconstitutional as discriminating in favor of home products, yet this does not make the sale of such wines a misdemeanor, but simply leaves the provision in regard to foreign wines inoperative. Nash, 97—514.

SOCIAL AND LITERARY CLUBS.—The members of a duly incorporated social and literary club, but no other persons, were permitted to purchase from defendant, the steward of the club, meals, cigars and liquors, which were furnished by the club at a price fixed by its officers, sufficient to cover the cost but not for the purpose of profit: *Held*, that furnishing liquors to the members of the club under these circumstances was a sale. Lockyear, 95—633.

INDICTMENT.—An indictment for selling in violation of the local option act need not negative the fact that the whiskey was sold on a physician's prescription, since the burden is on the defendant to show this fact if it exists. Emery, 98—768.

PUBLIC ACT.—On indictment for violation of the local option act it is not necessary to refer to the act in the bill. The court always takes judicial notice of public acts. Cooper, 101—684.

EFFECT OF ELECTION.—Defendant sold whiskey at a place in the town of Hendersonville, which was within two miles of Mud Creek Baptist Church, within which territory such sales were forbidden, but since the passage of the act incorporating the church an election under the local option act was held in Hendersonville, resulting in a majority for "license": *Held*, that an instruction that a sale within two miles of said church made defendant guilty was not erroneous, since under sec. 3116 of The Code it is provided that the election shall not "affect localities in

which the sale of spirituous liquors are prohibited by law." Hollingsworth, 100—535.

[NOTE.—The above mentioned section (Code, sec. 3116) was stricken out by the act of 1887, c. 215, and another section substituted, which leaves out the proviso as to the effect of the election in localities where sales are "prohibited by law."]

Where the election has been held, the returns canvassed and the result proclaimed substantially in compliance with the law, the fact that no petition for the election is shown by the state does not entitle defendant to an acquittal, as the result decided and proclaimed is conclusive in collateral proceedings. Emery, 98—768.

IRREGULARITIES IN HOLDING ELECTION.—The result of an election can only be impeached by an action brought for that specific purpose. Defendant on indictment for violation of the local option act can not take advantage of any irregularities in holding the election. Cooper, 101—684.

JURISDICTION.—The superior court has jurisdiction of offences against the local option act. Cooper, 101—684.

EFFECT OF CHANGE OF NAME OF TOWNSHIP.—A change of the name of a township after an election in favor of local option does not have the effect of repealing that law in such township. Cooper, 101—684.

SPIRITUOUS LIQUORS—DEFINITION OF TERM.—The term "spirituous liquors" embraces wines and lager beer and all other intoxicating liquors, whether produced by fermentation or distillation. Giersch, 98—720.

Sec. 410 (3117). Effect of election in favor of license. 1881, c. 262.

Should a majority of the votes cast in a county election be in favor of license the result shall not operate to permit the sale of spirituous or malt liquors in any township, city or town where the sale of such liquors is prohibited by law unless in such county election such city, town, or township shall have cast a majority of votes in favor of license.

Sec. 411 (3118). Duty of county commissioners.

Whenever any county, township, city or town shall vote in favor of license the board of commissioners of the county shall grant license for the sale of spirituous liquors to all proper persons applying for the same according to law.

LICENSE—WHEN AND FOR WHAT PERIOD GRANTED.—While the board of commissioners of a municipal corporation can not issue a license to retail liquors for a longer period than one year, the time need not begin and terminate with the term of office of the board which grants it, for they can grant a license which extends beyond their term of office, provided that it does not exceed one year, and does not begin to take effect after their term of office has expired. Hendersonville v. Price, 96—423.

COMMISSIONERS CAN NOT ARBITRARILY REFUSE LICENSE.—The commissioners of a county do not possess the arbitrary power of suppressing all palces for retailing spirituous liquors, nor are they bound to license an applicant though he be qualified by proof of good moral character. They have a limited legal discretion, and, in passing upon an application for license, they have a right to take into consideration the question whether the demands of the public require an increase of such accommodations.

and whether the place it is proposed to establish a bar-room is a suitable one. *Muller v. Commissioners*, 89—171.

WHEN MANDAMUS WILL NOT LIE.—Where county commissioners refuse to grant license to retail liquor on the ground that the applicant is not a fit person to sell, or that the place at which it is proposed to sell is not suitable for that business, a *mandamus* will not lie to compel the commissioners to grant it. *Commissioners v. Commissioners*, 107—335.

The issuance of a license to sell liquor by a board of county commissioners is a matter of discretion, and a *mandamus* will not lie to compel them to do so, it not being alleged and shown that their refusal to grant a license was arbitrary. *Jones v. Commissioners*, 106—436.

LOTTERIES.

See GAMBLING.

LYNCHING.

Sec. 412. Unlawful to break jail or conspire to do so for the purpose of killing or injuring prisoner. 1893, c. 461.

SECTION 1. Every person who shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; and every person who engages in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoner shall be guilty of a felony, and upon conviction thereof or upon a plea of guilty shall be fined by the court having jurisdiction of the offence, not less than five hundred dollars, and imprisoned in the state prison or the county jail not less than two nor more than fifteen years.

Sec. 2. Whenever the solicitor of any judicial district in this state shall ascertain that a crime as defined in the first section of this act has been committed in any county in his judicial district, it shall be his duty to go to such county at the earliest possible moment, and at once institute proceedings for the investigation of the crime before the coroner of the county, some judge of the superior court, or justice of the peace, and for the apprehension of the offender. In the performance of this duty he shall cause to

be issued subpoenas or other process to compel the attendance of witnesses and examine such witnesses on oath as to their knowledge or information touching the crime being investigated. In all cases where, upon preliminary investigation, it appears probable that any person is guilty of the crime charged, it shall be the duty of the coroner, judge or justice before (whom) the case is heard to bind such persons, with good security for his appearance at the next ensuing term of the superior or criminal court of some county adjoining the county in which the crime was committed for trial, and in default of bail to commit him to the jail of such adjoining county for safe keeping, and all necessary witnesses shall be recognized to appear at such term as witnesses for the state.

SEC. 3. If any person be summoned as a witness in the investigation provided for in this act, or before the grand jury or the court, wilfully fail to attend as a witness in obedience to the process served on him, or if after being sworn he refuses to answer questions pertinent to the matter being investigated before either tribunal, he shall be guilty of a misdemeanor, and on conviction thereof he shall be fined and imprisoned, one or both, at the discretion of the court.

SEC. 4. The superior court of any county in the state which adjoins the county in which the crime defined in the first section of this act shall be committed, shall have full and complete jurisdiction over the crime and the offender to the same extent as if this crime had been committed in the bounds of such adjoining county; and whenever the solicitor of the district has information of the commission of such crime, it shall be his duty to furnish such information to the grand juries of all adjoining counties to the one in which the crime was committed, from time to time until the offenders are brought to justice.

SEC. 5. In all investigations before a justice of the peace, coroner, judge, grand jury, or courts and jury, on the trial of the cause, as authorized by this act or under existing law, no person shall be excused from testifying touching his knowledge or information in regard to the offence being investigated, upon the ground that his answer might tend to subject him to prosecution, pains or penalties, or that his evidence might tend to criminate himself, but no discovery made by such witness upon any such examination shall be used against him in any court or in any penal or criminal prosecution, and he shall when so examined as a witness for the state be altogether pardoned of any and all participation in any crime arising under the provisions of this act or under existing law, concerning which he is required to testify.

SEC. 6. In all cases arising under the provisions of this act, the entire cost incurred in the prosecution, unless paid by the person or persons convicted of violating this act, shall be paid by the county wherein the crime defined in section first of this act shall have been committed. And whenever any solicitor goes to a county to investigate a crime of breaking or entering a jail as set forth in the first section of this act, the county where such crime is committed shall pay the solicitor the sum of one hundred dollars for making the investigation.

SEC. 7. When the sheriff of any county has good reasons to believe that the jail of his county is in danger of being broken or entered for the purpose of killing or injuring a prisoner placed by the law in his custody it shall be his duty at once to call on the commissioners of the county or some one of them for a sufficient guard for the jail, and in such case, if the commissioner or commissioners fail to authorize the employment of necessary guards to protect the jail, and by reason of such failure the jail is entered and a prisoner killed, the county wherein whose jail the prisoner is confined shall be responsible in damages to be recovered by the personal representatives of the prisoner thus killed, by action begun and prosecuted before the superior court of any county in this state.

MAIMING.

See also CASTRATION.

Sec. 413 (1080). Maiming with malice aforethought. R. C., c. 34, s. 14. 1754, c. 56. 1791, c. 339, s. 1. 1831, c. 12. 22 and 23 Car. II, c. 1, A. D. 1670 (called the Coventry Act).

If any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any person, with intent to murder, maim or disfigure, the person so offending, his counselors, abettors and aiders, knowing of and privy to the offence, shall, for the first offence, be punished by imprisonment in the penitentiary or county jail not less than four months nor more than ten years, and be fined, in the discretion of the court; and for the second offence shall be imprisoned in the penitentiary not less than five nor more than sixty years.

DEGREE OF DISFIGUREMENT SUFFICIENT.—Where the maim consisted in biting off an ear it is not necessary that the whole ear should have been

bitten off, but it is sufficient if enough is taken off to alter and impair the natural personal appearance and render the person less comely to ordinary observation. *Girkin*, 23 (1 Ired.), 121.

INTENT IMPLIED.—The intent to maim or disfigure may be implied from circumstances, and it is not necessary to prove antecedent grudges, or express design. *Irwin*, 2 (1 Hay.), 130.

Where an outrageous act, as a maim, is proved, the law presumes that it was done with that disposition of mind which the law requires to constitute guilt, and if not done on purpose defendant must show it. *Evans*, 2 (1 Hay.), 325.

MAIMING—PRESUMPTION OF INTENT.—Where a maim is proved, the law presumes that it was done unlawfully and with an intent to maim. *Evans*, 2 (1 Hay.), 281 (325).

The intent to disfigure is presumed from the act of maiming, and it is not necessary that there should be *malice prepense*. *Crawford*, 13 (2 Dev.), 425.

The intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, and the burden is on the defendant to repel that presumption. *Girkin*, 23 (1 Ired.), 121.

MALICE.

General malice, or malice against mankind, is wickedness, a disposition to do wrong, a diabolical heart, regardless of social duty and fatally bent on mischief. *Long*, 117—791.

Particular malice means ill-will, a grudge, a desire to be revenged on a particular person. *Long*, 117—791.

A definition of malice, as meaning bad temper, high temper, or quick temper, is erroneous. *Long*, 117—791.

MALFEASANCE IN OFFICE.

See OFFICERS.

MANSLAUGHTER.

See HOMICIDE.

MANUFACTURERS OF LUMBER.

Sec. 414. Manufacturers of lumber protected. 1891, c. 142.

Any person engaged in the manufacture of lumber in this state may have a mark or brand which shall be different from that of other persons, a description of which mark or brand shall be filed in the office of the register of deeds for the county in which said business is carried on, and recorded by said register of deeds in a book to be kept for that purpose, which book shall be marked "Registry of Timber Marks."

After the registration of said mark or brand the same shall be the property of the person having the same so registered in his name, and the owner of said mark or brand may have the same put or cut on any and all logs or pieces of timber belonging to him.

Any person who shall wilfully change, alter, erase or destroy any such mark or brand so put or cut upon any logs or timber, except by the consent of the owner thereof, with intent to steal the said logs or timber, shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both, and if the same shall have been done with a felonious intent, such person shall be guilty of a misdemeanor, and punished as for that offence.

If any person shall knowingly and wilfully take up or have in his possession any log or timber upon which said mark or brand has been put or cut, except by the consent of the owner thereof, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both.

WHO IS A MANUFACTURER.—One who carries on the business of buying timber and converting it into lumber for sale, is a manufacturer, and not a trader within the meaning of the revenue act requiring merchants and traders to pay a privilege tax. Chadbourn, 80—479.

MARL BEDS.

Sec. 415. Marl beds to be fenced. 1887, c. 235.

It shall be unlawful for any person to open any marl bed without surrounding it with a lawful fence: *Provided*, this act shall

not apply to any person whose marl bed is inclosed inside of his own enclosure.

Any person who violates this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisonment not exceeding thirty days in the discretion of the court.

MARRIAGES.

Sec. 416 (1083). Marriages, unlawful with female under fourteen years of age without consent of father. R. C., c. 34, s. 46. 1820, c. 1041, ss. 1, 2.

If any person shall marry a female under the age of fourteen years, he shall be guilty of a misdemeanor.

Sec. 417 (1084). Marriages, unlawful between whites and negroes. Const., Art. XIV, s. 8. R. C., c. 68, s. 7. 1834, c. 24. 1838-'9, c. 24.

All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited, and shall be void. And any person violating this section shall be guilty of an infamous crime, and punished by imprisonment in the county jail or penitentiary, not less than four months nor more than ten years, and may also be fined in the discretion of the court.

Sec. 418 (1085). Marriages, unlawful for register of deeds, clergyman and justice of the peace to consent to the marriage of a negro to a white person. R. C., c. 34, s. 80. 1830, c. 4, s. 2.

If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel, or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor.

Sec. 419 (1814). License, when to be issued by register of deeds. 1871-'2, c. 193, s. 5.

Every register of deeds shall, upon application, issue a license for the marriage of any two persons: *Provided*, it shall appear to him probable that there is no legal impediment to such marriage: *Provided further*, that where either party to the proposed marriage shall be under eighteen years of age, and shall reside with the father, or mother, or uncle, or aunt, or brother, or elder sister, or

shall reside at a school, or be an orphan and reside with a guardian, the register shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom said infant was placed at school, and under whose custody and control he or she is, shall be delivered to him, and such written consent shall be filed and preserved by the register.

Sec. 420 (1816). Penalty on register for issuing license unlawfully. 1871-'2, c. 193, s. 7. 1895, c. 387.

Every register of deeds who shall knowingly or without reasonable inquiry issue a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by section eighteen hundred and fourteen, shall forfeit and pay two hundred dollars to any parent, guardian or other person standing in *loco parentis* who shall sue for the same.

REGISTER NOT INDICTABLE UNDER THIS SECTION.—A register of deeds who issues a license for the marriage of a female under the age of fifteen years is not indictable under this section. The statute not only creates the offence but fixes the penalty that attaches to it and prescribes the method of enforcing it, and the rule of law is that wherever a statute does this, no other remedy exists than the one expressly given, and no other method of enforcement can be pursued than the one prescribed. Snuggs, 85—541.

Sec. 421 (1817). Penalty on minister or officer marrying without a license. 1871-'2, c. 193, s. 8.

Every minister or officer mentioned in section eighteen hundred and twelve, who shall marry any couple without a license being first delivered to him, as required by this chapter, or after the expiration of such license, or who shall fail to return such license to the register of deeds within two months after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars to any person who shall sue therefor, and shall also be guilty of a misdemeanor.

A private citizen who personates an ordained minister and, with the consent of the parties, solemnizes a marriage between a man and woman is not guilty of any criminal offence known to the common or statute law. Brown, 119—825.

A marriage, to be valid, must be acknowledged in the manner and before some person prescribed by sec. 1812 of The Code. Wilson, 121—650.

How MARRIAGE PROVEN.—Marriage may be proven by the admission of the defendant. Melton, 120—591; Wylde, 110—500.

The record of the book of marriages for the county is competent evidence of marriage. Melton, 120—591.

An eye-witness of the ceremony can testify as to the marriage. Wyld, 110—500.

Admissions of a marriage in a foreign country are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country where it is stated to have taken place. Wyld, 110—500.

Marriage may be proven by admissions or by circumstantial evidence. Wyld, 110—500.

Marriage and cohabitation are public acknowledgments of the relation of husband and wife, and do not come within the nature of confidential relations. Melton, 120—591.

Owing to the peculiar status of slave marriages our statute, The Code, sec. 1842, provides that consent, followed by cohabitation constitutes a legal marriage as to persons who were formerly slaves. Melton, 120—591.

How DIVORCE PROVEN—ADMISSIONS.—A divorce may be shown by the admissions of the defendant. Misenheimer, 123—758.

MASTER AND SERVANT.

Sec. 422 (3119). Persons enticing servant from employer may be sued. 1866, c. 58. 1881, c. 303.

If any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted in writing or orally to serve his employer, to unlawfully leave the service of his master or employer; or, if any person shall knowingly and unlawfully harbor and detain, in his own service and from the service of his master or employer, any servant who shall unlawfully leave the service of such master or employer; then, in either case, such person and servant may be sued, singly or jointly, by the master, and, on recovery, he shall have judgment for the actual double value of the damages assessed.

Sec. 423 (3120). Additional penalty. 1866-'7, c. 124.

In addition to the remedy given in the preceding section against the person and servant violating the preceding section, such person and servant shall also pay a penalty of one hundred dollars to any person suing for the same, singly or jointly, one-half to his use and the other to the use of the poor of the county where the suit was brought, and the offender shall be guilty of a misdemeanor and fined not exceeding one hundred dollars or imprisoned not exceeding six months.

SERVANTS LEAVING MASTER'S EMPLOYMENT.—A servant is not indictable under this statute for wilfully leaving the employment of one whom he

had agreed to serve. The statute has reference only to persons enticing servants to leave the service of their employer. Daniel, 89—553.

TENANTS.—Where a person agrees to cultivate land for another, and, in addition to the payment of the stipulated rent, to work for the other whenever he can leave his own crop and is needed by the other, the relation of master and servant is not created by the contract, but that of landlord and tenant, and a person employing the tenant is not guilty of enticing a servant. Hoover, 107—795.

INDICTMENT.—The indictment is sufficient if it alleges a contract with the servant, or those who may be authorized to contract on his behalf, without specifying whether it was in writing or oral; nor is it necessary to set forth the means by which the enticing was accomplished where the words employed in the statute are used in the indictment in describing the offence. Harwood, 104—724.

INFANTS.—A stranger or third person who unlawfully interferes and induces a servant to leave his employer, is guilty, though the servant is an infant. The contract is voidable only at the election of the infant, and can not be treated as a nullity by third persons. Harwood, 104—724.

CONSTITUTION.—This statute is not in conflict with the constitution because limited to laborers and servants. Harwood, 104—724.

PARENTS NOT GUILTY.—A parent, who commands his minor son, who has entered into the contract with his employer without his parents' consent to quit work and leave his employer, is not guilty under the act. Anderson, 104—771.

MAYHEM.

See MAIM.

MILLS.

Sec. 424 (1086). Mills, owners of, to keep up bridges over ditches, drains and canals R. C., c. 34, s. 40. 1819, c. 941, s. 3.

Every owner of a water-mill, situated on any public road, and also every person whose duty it is to keep up and repair bridges built across any ditch, drain or canal, in the chapter entitled "Roads, Ferries and Bridges," who shall refuse or neglect to keep up and repair, or who shall suffer to remain out of repair for the space of ten days, any bridge which by law he may be required to keep up and repair, shall be guilty of a misdemeanor.

INDICTMENT MUST SHOW HOW DEFENDANT IS SUBJECT TO THE DUTY OF REPAIRING.—An indictment against an individual for permitting a public

bridge to become ruinous, must set forth *how* he became subject to the duty of making repairs. King, 25 (3 Ired.), 411.

A proprietor of a mill who cuts a canal across a public road, whereby the passage along the highway is obstructed, and those who are in possession of the mill, claiming under him and using the canal, are liable to an indictment for such obstruction, the one for creating and the other for continuing the nuisance. But if a bridge is erected over a canal already cut neither is indictable for simply suffering the bridge to be out of repair. Yarrell, 34 (12 Ired.), 130.

Sec. 425 (1087). Mills, the destruction or obstruction of dams, canals or water-channels, connected with a mill, factory or machine-works, indictable. 1866, c. 48.

Any person who shall cut away, destroy or otherwise injure any dam, or part thereof, or shall obstruct or damage any race, canal or water-channel erected, opened, used, or constructed, for the purpose of furnishing water for the operations of any mill, factory or machine-works, or for the escape of water therefrom, shall be liable to be indicted in the county in which the offence shall have been committed; and upon conviction shall be fined or imprisoned, or both, at the discretion of the court, and shall also be liable to an action in said court for damages, by the person or company thus injured.

Where a grantor of land reserves the right to back water upon it from his milldam, the mere cultivation of the soil by the grantee is not an act of possession adverse to the owner of the easement. Suttle, 115—784.

Where a grantor of land reserves an easement and subsequent conveyances do not mention such reservation, the easement is not affected by such omission. Suttle, 115—784.

The rights to an easement may be acquired or lost by an adverse user, but in either case the user must be of such a nature as to expose the claimant under it to an action at any time for twenty years. Suttle, 115—784.

Section 1 of chapter 173, Acts of 1895 which applies only to certain counties, makes it unlawful "to sell or purchase mill logs in quantities of 1,000 feet or more without their being inspected and measured by a sworn inspector," while section 6 provides that "no mill owner or his employee shall have or cause to have mill logs cut by the 1,000 feet without their being inspected and measured by a sworn inspector." The only penalty prescribed for a violation of the act is in section 8 which provides that "any violation of this act either by seller or purchaser shall be fined not less than \$20 nor more than \$40 for each offence, at the discretion of the court": *Held*, (1) that the penalty prescribed by the act applies only to the offence forbidden by section 1, of which a justice has jurisdiction; (2) that as no penalty is prescribed for the violation of section 6 it is a misdemeanor unlimited as to its punishment, and, therefore, not within the jurisdiction of a justice of the peace. Addington, 121—538.

The term "mill logs" or "saw logs" does not include "standing timber" within the meaning of section 1, chapter 173, laws of 1895. Addington, 121—538.

Sec. 426 (1848). Measures to be kept. R. C., c. 71, s. 7. 1777, c. 121, s. 11. 1885, c. 202.

All millers shall keep in their mills the following measures, namely, a half-bushel and peck of full measure, and also proper toll-dishes for each measure; and every owner, by himself or servant, keeping any mill, who shall keep any false toll-dishes, contrary to the true intent and meaning of this chapter, shall be guilty of a misdemeanor. It shall be lawful for any miller to take toll either by weight or measure at the option of the customer and miller: *Provided*, that in no case shall more toll be taken than is now allowed by law.

EVIDENCE.—Evidence that a mill owner kept a measure containing one-seventh, and another one-sixth of a half-bushel, with which he openly took toll of all customers, is sufficient to support an indictment for taking more toll than he had a right to take. Perry, 50 (5 Jones), 252.

INDICTMENT.—An allegation that the mill was one where a false toll-dish was used to exact more toll than was lawful is a sufficient averment that the mill was one used for grinding wheat and corn, though that fact must appear in some way with sufficient certainty. Perry, 50 (5 Jones), 252.

MILITARY COMPANIES.

Sec. 427. Military companies must be legally organized. 1885, c. 349.

It shall be unlawful for any persons to organize a military company, or drill or parade under arms as a military body, except under the militia laws and regulations of this state; and no persons shall exercise or attempt to exercise the power or authority of a military officer in this state unless he holds a commission from the Governor; and any person offending against this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned at the discretion of the court.

MINORS.

See also INFANTS.

Sec. 428. Minors, enticing from state, misdemeanr. 1891, c. 45.

Any person who shall employ and carry beyond the limits of this state any minor, or who shall induce any minor to go beyond the

limits of this state for the purpose of employment without the consent in writing, duly authenticated, of the parent, guardian or other person having authority over such minor shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than five hundred and not more than one thousand dollars for each offence.

The fact of the employment and going out of the state of the minor, or of the going out of the state by the minor, at the solicitation of the person for the purpose of employment, shall be *prima facie* evidence of knowledge that the person employed or solicited to go beyond the limits of the state is a minor.

Sec. 429. Exposure of children to fire. 1893, c. 12.

SECTION 1. It shall be unlawful for any person or persons in this state to leave any child or children, of the age of seven years or less, locked or otherwise confined in any dwelling, building or enclosure, and go away from said dwelling, building or enclosure, without leaving in charge of the same some person or persons of the age of discretion, so as to expose said child or children to danger by fire, and any person or persons so offending shall be guilty of a misdemeanor, and shall be punished at the discretion of the court.

Sec. 430. Unlawful to sell deadly weapons to minors. 1893, c. 514.

SECTION 1. It shall be unlawful for any person, corporation or firm knowingly to sell or offer for sale, give or in any way dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie knife, dirk, loaded cane, or sling-shot.

SEC. 2. Any person, corporation or firm violating this act shall be guilty of a misdemeanor, and upon conviction for each and every offence shall be fined or imprisoned, one or both, in the discretion of the court.

Sec. 431. Manufacturer refusing to pay minor for labor on raw material guilty of misdemeanor. 1893, c. 309.

SECTION 1. Whenever any person having a contract with any corporation, company or person for the manufacture or change of any raw material by the piece or pound shall hire and employ any minor to assist in said work upon the faith of and by the color of said contract and with intent to cheat and defraud said minor, and shall secure the contract price and shall wilfully fail to pay said minor when he shall have performed his part of said contract work, whether done by the day or by the job, the person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

MISMARKING.

See INJURY TO STOCK.

MOCKING BIRDS.

Sec. 432. Unlawful to kill mocking birds or destroy their nests. 1897, c. 491.

Any person who shall rob or destroy the nests of mocking birds, or who shall take any eggs from their nests, or who shall kill any mocking birds, shall be fined not less than ten dollars, and be guilty of a misdemeanor.

MONUMENTS.

See also GRAVES AND GRAVE YARDS.

Sec. 433 (1088). Monuments and tombstones, unlawful to deface or remove. R. C., c. 34, s. 102. 1840, c. 6.

If any person shall, unlawfully and on purpose, remove from its place any monument of marble, stone, brass, wood or other material, erected for the purpose of designating the spot where any dead body is interred, or for the purpose of preserving and perpetuating the memory, name, fame, birth, age or death of any person, whether situated in or out of the common burying ground, or shall unlawfully or on purpose break or deface such monument, or alter the letters, marks or inscription thereof, he shall be guilty of a misdemeanor.

INDICTMENT.—The indictment need not designate the name of the person whose tomb has been defaced, nor is it necessary to charge that the dead body was that of a human being. Wilson, 94—1015.

EVIDENCE.—Evidence that defendant caused his employees to plow up the ground and displace the grave-stones, is sufficient to go to the jury. Wilson, 94—1015.

OWNER OF LAND.—Where the owner of land consents, either expressly or by implication, to the interment of the dead bodies on his land, he has no right afterwards to remove the bodies, or to deface or pull down the grave-stones and monuments erected. Wilson, 94—1015.

MORTGAGED PROPERTY.

Sec. 434 (1089). Mortgaged property, unlawful to dispose of; sufficiency of indictment and proof. 1873-'4, c. 31. 1874-'5, c. 215. 1883, c. 61.

If any person, after executing a chattel mortgage, deed in trust or other lien for a lawful purpose shall, after the execution thereof, make any disposition of any personal property embraced in such mortgage, deed in trust or lien, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit such deed was made, every person so offending and every person with a knowledge of the lien buying the property embraced in any such deed or lien, and every person assisting, aiding or abetting the unlawful disposition of such property, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit any such deed or lien was made, shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, in the discretion of the court.

In all indictments for violations of the said provisions of this section, it shall not be necessary to allege or prove the person to whom any sale or disposition of said property was made, but proof of the possession of the property embraced in such chattel mortgage, deed in trust or lien by the grantor thereof, after the execution of said chattel mortgage, deed in trust or lien, and while it is in force, and further proof of the fact that the sheriff or other officer charged with the execution of said process can not after due diligence find said property under process directed to him for its seizure, for the satisfaction of such chattel mortgage, deed in trust or lien, or that the mortgagee demanded the possession thereof of the mortgagor for the purpose of sale to foreclose said mortgage, deed in trust or lien, after the right to such foreclosure had accrued, and that the mortgagor failed to produce, deliver or surrender the same to the mortgagee for that purpose, shall be *prima facie* proof of the fact of a disposition or sale of said property, by said grantor, with the intent to hinder, delay or defeat the rights of the person to whom said chattel mortgage, deed in trust or lien was made.

INDICTMENT.—An indictment for disposing of mortgaged property, which, after giving the name of the mortgagor and mortgagee, charges that defendant, a third person, sold and disposed of the property with a knowledge of the lien and with intent to hinder, delay and defeat the rights of the mortgagee, without charging that he aided or abetted the maker of the mortgage, or that he bought with a knowledge of the lien, can not be sustained. Woods, 104—898.

The statute embraces three classes of offenders: (1) The maker of the lien who shall dispose of the property with unlawful intent; (2) those

who buy with a knowledge of the lien; and (3) those who aid or abet the unlawful disposition with unlawful intent. *Ibid.*

The indictment must set forth that the lien was in force at the time of the sale, and must also state to whom the property was sold. *Burns, 80—376.*

Where the indictment contains two counts, one charging an intent to defraud G "business manager" of an association, the other an intent to defraud G, "business manager and agent" of such association, the counts are not repugnant to each other, since they relate to one transaction varied only to meet the probable proof, and the court will neither quash nor force the state to elect. *Surles, 117—720.*

DESCRIPTION.—A mortgage conveyed "my tobacco crop, to be grown this year on my own land, and to contain eight acres, including one-third in the crop of G to contain not less than three acres, and my one-third interest in J's crop, not less than two acres, all on my own land to be grown this year." The evidence was that the mortgagor held only a bond for title to the tract of land. Defendant purchased of the mortgagor with a knowledge of the lien: *Held*, that the description was sufficient, and that the mortgage embraced all the crop mentioned, notwithstanding the mortgagor held only a bond for title, and that defendant was guilty. *Logan, 100—454.*

A description of the lands on which the crop disposed of was grown as "18 acres on my (defendant's) own land in A township, H county" is sufficient. *Surles, 117—720.*

CONSIDERATION.—A chattel mortgage given for a past debt, or for supplies to be afterwards furnished, is based on sufficient consideration. *Surles, 117—720.*

INFANTS.—An indictment for disposing of mortgaged property can not be sustained against an infant, since the alleged disposition amounts to a disaffirmance of the contract. *Howard, 88—650.*

INTENT.—Where the disposition of the mortgaged property necessarily results in hindering, delaying or defrauding the mortgagee, it will be presumed that the intent to produce such result existed, but where such result would not naturally or necessarily follow, as where sufficient property remains after the disposition to pay the debt secured, the intent with which the disposition was made is a question of fact to be passed on by the jury. *Manning, 107—910.*

The burden is on the defendant to disprove the criminal intent in disposing of the mortgaged property. *Surles, 117—720.*

The actual sale of mortgaged crops raises a presumption of fraudulent intent. *Holmes, 120—573.*

Evidence that defendant applied the whole crop mortgaged to the discharge of his landlord's prior lien, is competent to disprove the criminal intent. *Ellington 98—749.*

NAME OF PERSON RECEIVING PROPERTY MUST BE GIVEN.—An indictment for disposing of mortgaged property which fails to state the manner of disposition, or the name of the person receiving the property, is fatally defective. *Pickens, 79—652.*

COLLATERAL OFFENCE.—Evidence that five months after the offence was committed the defendant offered to dispose of another article covered by the same mortgage is inadmissible to prove the intent with which the offence was committed. The collateral offence to prove the intent must be confined to a time before, or just about the time the offence charged against the defendant is alleged to have been committed. *Jeffries, 117—727.*

400 MORTGAGED PROPERTY.—MURDER.—NEW TRIAL.

EVIDENCE.—Where the indictment charges an intent to defraud G, the manager of an association, the fact that G is such manager can be proved by parol though the books of the association contain a record of his election. *Surles*, 117—720.

MURDER.

See HOMICIDE.

NEW TRIAL.

Sec. 435 (1202). New trial to defendants. R. C., c. 35, s. 35. 1815, c. 895, amended.

The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases.

WITNESS NOT SWORN.—Where a witness was not sworn, and the fact was not discovered until after the jury retired, defendant is not entitled to a new trial as a matter of law, but it is in the discretion of the court to grant or refuse it. *Gee*, 92—756.

VARIANCE.—A new trial will not be granted by the supreme court for a variance between the allegation and the proof where no exception is taken in the court below. *Craige*, 89—475.

NEWLY DISCOVERED EVIDENCE.—A new trial for newly discovered evidence can not be given in a criminal action. *Starnes*, 97—423.

A new trial for newly discovered testimony can not be granted in criminal actions. *Following State v. Jones*, 69—16; *State v. Starnes*, 94—973. *Rowe*, 98—629.

Where the newly discovered evidence upon which a new trial is asked is simply that a witness for the state, before the trial, spoke in hostile terms of the prisoner and wished for his conviction, the discretion of the judge is properly exercised by refusing the motion. *DeGraff*, 113—688.

A new trial will not be granted for newly discovered testimony where it is merely cumulative, or only tends to contradict or discredit the opposing witness. *DeGraff*, 113—688.

The granting of a new trial upon newly discovered testimony is, in the absence of gross abuse, discretionery, and the exercise of such discretion is not reviewable. *DeGraff*, 113—688.

MISCONDUCT OF JURY.—After the jury had retired four of them took a drink of whiskey out of a flask which one of them had in his pocket, but none of them became intoxicated. The paper alleged to have been forged by defendant and which had been put in evidence was in an unlocked drawer in the room with the jury, but none of them looked at it: *Held*, that these facts show no such misconduct of the jury as vitiated the verdict,

and that the refusal of the court to hear affidavits of members of the jury on a motion to set aside the verdict for improper conduct, was not error. Bailey, 100—528.

The granting or refusing a new trial rests in the discretion of the trial judge when the circumstances are such as merely to put suspicion on a verdict by showing, not that there was, but that there might have been undue influence brought to bear on the jury because there was opportunity; but, where the fact appears that undue influence was brought to bear on the jury, or that they heard other evidence than that offered on the trial, the supreme court will, as a matter of law, grant a new trial whether the defendant be convicted or acquitted, since there has been no trial in contemplation of law. Perry, 121—533.

Where the jury, after the close of the evidence, visited the scene of the alleged crime and made inquiry of a passer-by as to the identity of a certain house whose distance from the alleged *locus* was material, their conduct in thus eliciting other evidence than that offered on the trial is ground for a new trial whether their visit to the spot was by or without leave of the court. Perry, 121—533.

The fact that the jury partook of refreshments after retiring is not sufficient for a new trial unless it appear that such refreshments were furnished by the party in whose favor they have rendered their verdict. Sparrow, 7 (3 Murph.), 487.

It was not error to refuse a new trial because several of the jurors made affidavit that they were induced to join in the verdict of guilty in the belief that the recommendation of mercy accompanying their verdict would prevent the infliction of the death penalty. Best, 111—638.

Where a motion for a new trial is based on affidavits the supreme court will not look into them; the court below must find the facts and spread them upon the record. Best, 111—638.

NON-RESIDENT JUROR.—The fact that a juror is not a resident of the county in which the indictment is tried is a good ground for challenge, but not for a new trial after verdict is rendered. White, 68—158.

TRIAL DE NOVO ON WHOLE CASE, THOUGH DEFENDANT ACQUITTED ON ONE COUNT.—Where there is an acquittal on one count in an indictment and a conviction on another, and the defendant appeals, if a *venire de novo* is awarded it must be to re-try the whole case. Stanton, 23 (1 Ired.), 424.

MOTION TO SET ASIDE JUDGMENT TAXING PROSECUTOR WITH COSTS.—A motion to set aside an irregular judgment taxing prosecutor with the costs of the prosecution can not be made more than a year after the rendition of the judgment. Horton, 89—581.

REMEDY WHERE PROSECUTOR IS ERRONEOUSLY TAXED WITH COSTS AND FAILS TO APPEAL.—Where a prosecutor is taxed with the costs of the prosecution by an *erroneous* judgment, such judgment can not be set aside at a subsequent term of the court because of such rulings as render it simply erroneous; but where, in such case, he fails to appeal and sufficient excuse exists for his failure, his remedy is to apply for the writ of *certiorari*. Horton, 89—581.

ON INDICTMENT FOR FALSE PRETENCE A SPECIAL VERDICT MUST FIND A CRIMINAL INTENT.—Where, on indictment for false pretences, a special verdict is rendered which fails to find a *criminal intent*, the verdict will be set aside and a new trial granted. Blue, 84—807.

REHEARING IN SUPREME COURT.—The supreme court has no power to rehear a criminal action. Jones, 69—16.

COURT CAN NOT SET ASIDE A VERDICT OF NOT GUILTY.—The judge has no right to set aside a verdict of not guilty, nor to grant a new trial after

verdict of not guilty, on the motion of the state on the ground that one of the jurors had been improperly sworn. Freeman, 66—647.

FACTS MUST BE FOUND.—Where the facts are not found by the trial judge and spread upon the record, affidavits of grounds for a new trial can not be considered in the supreme court in reviewing the refusal of the motion. DeGraff, 113—688.

DISCRETION—MISTAKEN OPINION.—Where the trial judge rests his refusal to exercise his discretion upon the mistaken opinion either that it is not vested in him or that the facts are not such as to call for its exercise, it is error. Fuller, 114—885.

DISCRETION—WANT OF POWER.—A juror upon his *vior dire* swore that he had neither formed nor expressed an opinion as to the guilt of the prisoner and was accepted, and, after verdict and upon motion for a new trial, it appeared from affidavit that such juror had declared that, if summoned on the jury, he would hang the prisoner. The trial judge refused the motion because "the affidavits were not sufficiently strong": *Held*, that this was a refusal to exercise the court's discretion on the ground of a lack of power, and was, therefore, erroneous. Fuller, 114—885.

INSANITY OF JUROR.—Where insanity of a juror is alleged as ground for a new trial it must be proved by clear and full evidence. Scott, 8 (1 Hawks), 25.

A motion for a new trial on the ground that one of the jurors became insane shortly after the rendition of the verdict, and might be supposed to have been insane while on the jury, may be denied in the discretion of the court, in the absence of any evidence that the juror was insane while acting as a juror. Rogers, 94—860.

NOLLE PROSEQUI.

EFFECT OF NOL. PROS.—A *nolle prosequi* does not amount to an acquittal of the defendant, but he may again be prosecuted for the same offence, or fresh process may be issued to try him on the same indictment at the discretion of the prosecuting officer. Defendant, however, is not required to give bond for his appearance at any other time. Thornton 35, (13 Ired.), 256.

HOW CAPIAS ISSUED AFTER NOL PROS.—A *capias*, after a *nol pros.*, does not issue as a matter of course at the will of the prosecuting officer, but leave of the court must be first obtained. Thornton, 35 (13 Ired.), 256.

SUBMISSION.—Where there are more than one count in the indictment a submission can not be made on one unless a *nol. pros.* is entered as to the others. Roberts, 2 (1 Hay.), 176, (201).

NOL PROS. OF DEFECTIVE COUNT AFTER MOTION TO QUASH.—After a motion to quash an indictment containing two counts, one of which is defective, the solicitor may enter a *nol pros.* as to the defective count, and try on the other. Buchanan, 23 (1 Ired.), 59.

NON-TRANSFERABLE SCRIP.

Sec. 436. Non-transferable scrip, unlawful to issue to laborers. 1889, c. 280. 1891, c. 456.

It shall be unlawful for any person or persons, firm or corporation, who employ laborers by the day, week or month, to issue in payment for such labor any ticket or tickets, or other scrip bearing upon their face the words "non-transferable," or to issue tickets or scrip in any form that would render them void by transfer from the person or persons to whom issued; but all tickets or scrip issued to laborers for labor done shall be paid to the person holding the same their face value by the person or persons, firm or corporation issuing the same. Any person or persons, firm or corporation violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof be fined not less than ten dollars nor more than fifty dollars for each offence, or imprisoned not more than thirty days.

NUISANCE.

INDICTMENT—PROFANITY.—An indictment charging the use of profane and vulgar language on a certain day and on divers other days in a public street, and in the hearing and presence of divers persons then and there assembled, and then and there repeating the same to the evil example and common nuisance of all good citizens then and there assembled, is sufficient. *Brewington*, 84—783.

An indictment for a nuisance by profanely swearing in a public place must set out the profane words, so that the court may decide as to their quality, and must also state that the offence was committed "in the presence and hearing of divers persons then and there assembled," and that "the acts were so repeated in public as to have become an annoyance and inconvenience to the public." *Barham*, 79—646.

An indictment which charges that defendant, in a public street, "did profanely curse and swear and take the name of Almighty God in vain," to the common nuisance of the good people of the state then and there assembled, without stating how loud or how long he swore, or whether he was heard by one or many, is insufficient. *Powell*, 70—67.

An indictment for swearing and taking the name of God in vain "for the space of two hours to the common nuisance of all the citizens of the state," is defective for failure to charge that the acts were so repeated and so public as to become an annoyance and inconvenience to the public, and that the swearing was in the hearing of persons then and there assembled. *Jones*, 31 (9 Ired.), 38.

The indictment must charge that the profanity was uttered in hearing of divers persons, and an averment that it was "to the common nuisance of all the good citizens of the state then and there assemble does not supply the omission. Pepper, 68—259.

VERDICT.—Beating the drum and blowing the fife do not *per se* constitute a nuisance, and a special verdict finding that "some of the citizens were disturbed by the noise of the drums made by a procession celebrating emancipation day," without stating how many, or that the noise became so inconvenient and troublesome as to annoy the whole community, is not sufficient to warrant a judgment of guilty. Hughes, 72—25.

MILL-DAM.—To render a mill-dam and pond a nuisance, and those who maintain it indictable therefor, it must be made apparent that the whole community, not every individual, but the community generally, is injuriously affected thereby. Holman, 104—861.

If the dam and pond are the proximate cause of the nuisance, those who maintain it are guilty, though such nuisance is aggravated by other causes which the owners did not produce, and over which they had no control. *Ib.*

If the nuisance is entirely the result of agencies and causes for which the owners are not responsible, operating upon the dam and pond and infecting them with pernicious qualities, those who maintain them are not liable criminally. *Ib.*

Evidence of the condition of the pond and adjacent lands prior to the indictment is competent. *Ib.*

The mere erection of the frame of a dam which, when completed by further work thereon, will pond water back and create a nuisance, does not of itself constitute a nuisance before injury ensues. Suttle, 115—784.

RIBALD SONG.—Where a ribald song is sung in a loud and boisterous manner on the public streets, in the presence of divers persons then and there present, and such singing continues for the space of ten minutes, this is a nuisance, though the special words charged may not have been repeated. Toole, 106—736.

DRUNKENNESS.—Private drunkenness is not an offence, but public drunkenness may become a nuisance, and, therefore, an indictment which simply charges that defendant was a common, gross, and notorious drunkard, and that he, on divers days and times, got grossly drunk, is insufficient. Waller, 6 (2 Murph.), 230.

DRUNKENNESS AND PROFANITY.—Getting drunk on a single occasion and using loud and profane language "on or near the edge of one of the public streets" of a town is not indictable for a nuisance, if the persons assembled were not thereby annoyed or disturbed. DeBerry, 27 (5 Ired.), 371.

SWEARING.—The continued and public use of profane oaths, frequently and boisterously repeated, though on a single occasion and but for the space of five minutes, is indictable as a public nuisance. Chrisp, 85—528.

Profane swearing, independent of the disturbance which it produces to those who hear it, is not indictable. Kirby, 5 (1 Murph.), 254.

A common profane swearer is indictable as a common nuisance. Ellar, 12 (1 Dev.), 268.

SLAUGHTER-PEN.—Where, in the trial of an indictment for creating a common nuisance by maintaining a slaughter-pen, there was no testimony showing that the community generally were annoyed or affected injuriously by the noxious odors complained of, the court properly declined to submit to the jury the question whether such an injury to the residents of the

neighborhood as amounted to a public nuisance had been shown. Wolf, 112—889.

To sustain an indictment for keeping a slaughter-pen producing offensive odors, constituting a public nuisance to all citizens passing along an adjacent public road, it is necessary to prove that the road upon which the citizens were annoyed was a public highway. Wolf, 112—889.

MUST BE IN PRESENCE OF OTHERS.—To make an act a nuisance it must be done in the presence and hearing and to the annoyance of divers persons about the place where the act was done. Cainan, 94—880.

A nuisance is to the public and not an injury or annoyance which a person causes to himself and family. Hard, 122—1092.

PUBLIC HIGHWAY.—Where, on the trial of an indictment for creating and maintaining a common nuisance to persons "passing along a common road and public highway," there was no evidence tending to show that any person while passing along the road was actually annoyed or that the public had acquired an easement in such road, the court erred in refusing to instruct the jury that the defendant was not guilty in any aspect of the testimony. Wolf, 112—889.

OBSCENE LITERATURE.

Sec. 437. Obscene literature, indictable to exhibit, publish or sell. 1885, c. 125.

Any person exhibiting for the purpose of gain, lending for hire or otherwise publishing or selling for the purpose of gain, or exhibiting in any school, college or other institution of learning, or having in his possession for the purpose of sale or distribution, any obscene book, paper, writing, print, drawing or other representation, shall be guilty of a misdemeanor.

OBSTRUCTING ROADS.

See **ROADS**.

OBSTRUCTING WATERCOURSES.

See **WATERCOURSES**.

OFFICERS.

Sec. 438 (1090). Officers failing to discharge their duties, may be indicted and removed from office. R. C., c. 34, s. 119. 1779, c. 115, s. 4.

If any clerk, sheriff, justice of the peace, or any other officer, who is required, in entering upon his office, to take an oath of office, shall wilfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, the clerk or other officer so offending shall be guilty of a misdemeanor. And if it shall be proved, that any such officer, after his qualification, shall have violated his said oath, and willingly and corruptly have done anything contrary to the true intent and meaning thereof, such officer shall be guilty of misbehaviour in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offence; and shall also be fined and imprisoned, in the discretion of the court.

WHO IS AN OFFICER DE FACTO.—An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised: (1) Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, such as taking the oath, giving a bond, or the like; (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such as ineligibility, want of power or defect being unknown to the public; (4) under color of an election or appointment, by or pursuant to a public unconstitutional law before the same is adjudged to be such. Lewis, 107—967.

REGISTRAR OF AN ELECTION REFUSING TO ALLOW A VOTER TO REGISTER.—A registrar of an election who refuses to allow a voter to register, on the ground that the town charter under which such registrar is acting requires the payment of all taxes due the city as a qualification for voters, and that such voter has not paid his town taxes, can not be convicted under this section, though that part of the charter which requires the payment of town taxes as a qualification for voters may be unconstitutional, since nothing can be inferred against him for assuming that the charter is valid. Powers, 75—281.

WHEN OFFICERS INDICTABLE.—An officer who has to exercise his judgment or discretion is not liable *criminally* for any error which he commits, *provided he acts honestly*; but any officer, whether judicial or ministerial, who acts corruptly is responsible, both civilly and criminally, whether he acts under the law or without the law. Powers, 75—281.

REGISTER OF DEEDS, MARRIAGE LICENSE.—A register of deeds is not indictable for issuing a marriage license for a female of the age of fifteen

years without her father's consent in writing. The Code, sec. 1816, giving a penalty for such offence, prescribes the only mode of proceeding, which excludes that by indictment. Snuggs, 85—541.

INDICTMENT—WHAT THE STATUTE EMBRACES.—An indictment against a register of deeds for issuing a marriage license for a female under fifteen years of age without the written consent of her father, can not be sustained under this section, since the section embraces acts of omission only, and does not extend to every illegal act done by virtue of office Snuggs, 85—541.

OVERSEER OF THE POOR.—An overseer of the poor is a public officer and liable to indictment for neglect of his duties or abuse of his powers. Hawkins, 77—494.

An indictment against an overseer of the poor for failure to provide adequate support for the paupers in his charge is fatally defective if it fails to set out the names of such paupers or state that their names are unknown. Hawkins, 77—494.

INDICTMENT.—An indictment under this section must allege that the officer was required by law to take an oath of office before entering upon the discharge of his official duties. Pritchard, 107—921.

An indictment alleging that defendant "did receive *and* consent to receive" unlawful compensation as a public officer, is not defective because of the use of the word "and" instead of "or" as used in the statute. Wynne, 118—1206.

CLERK SUPERIOR COURT, EMBEZZLEMENT.—This statute does not embrace the case of a clerk of the superior court charged with the embezzlement of money paid him by an administrator for one of the distributees of an estate. Connelly, 104—794.

FAILURE TO SEND UP TRANSCRIPT.—It being the duty of the clerk to send up the transcript on appeal in a criminal action, whether the fees are paid or not, *it seems* that he would be indictable for such neglect of duty. Deyton, 119—880.

NOT NECESSARY THAT ANY PERSON BE INJURED.—If a public officer, entrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, though no injurious effects result to any individual from his misconduct. The crime consists in his public example, in perverting those powers to purposes of fraud and wrong, which were committed to him as instruments of benefit to the citizens and of safety to their rights. Glasgow, 1 (Conf.), 176.

ANOTHER OFFENCE INTENDED—INDICTMENT.—An officer can not refuse to act because an offence is charged informally or defectively, and another offence is intended, which, in contemplation of law, did not exist. Davis, 111—729.

UNCONSTITUTIONAL ACT.—An officer is not indictable for obeying an unconstitutional act, nor for refusing to perform certain duties under a former law attempted to be repealed by a subsequent unconstitutional statute, until at least after a decision by competent authority. Godwin, 123—697.

ENROLLING CLERK—INSUFFICIENT EVIDENCE.—On indictment against the enrolling clerk of the general assembly for fraudulently enrolling a bill which had never passed either branch, the testimony of all the witnesses for the defendant, and all but one of those for the state, tended to show that the defendant never saw the bill, and had no knowledge of its existence until after the close of the session. One witness for the state, who had copied the bill, testified that defendant had assisted her in verifying the copy on the last day of the session, when there was a

great deal of confusion in the defendant's office, but this was denied by defendant and other witnesses. There was no evidence of bribery or of any understanding or collusion between the defendant and others in regard to the enrollment of the bill: *Held*, that it was error to refuse an instruction that there was no evidence of corruption on the part of the defendant. Brown, 119—789.

CARELESSNESS.—Honesty and good intent are not a full defence to an indictment for neglect of public duty, if there is evidence of wilful carelessness in the discharge of official duty, resulting in injury to the public. Hatch, 116—1003.

SACRIFICE OF PUBLIC PROPERTY BY SALE.—A sale by county commissioners of county property, at a grossly inadequate price and for less than could have been obtained by reasonable effort, and without opportunity for competition, is evidence of omission of duty under this section. Hatch, 116—1003.

INTENT.—A corrupt intent need not be shown. Hatch, 116—1003.

TWO OFFENCES CREATED.—This section creates two offences—one the wilful omission, neglect or refusal to discharge the duties of an office, the other the wilful and corrupt action of an officer by omission or commission, contrary to his oath of office. Hatch, 116—1003.

Public officers are responsible to the people for acts of omission as well as commission. Hatch, 116—1003.

IRREGULAR APPOINTMENT.—One who undertakes to exercise, and does exercise, the duties of an officer and receives the emoluments thereof, is liable for a malfeasance, though his appointment is irregular or defective and his title defeasible. Wynne, 118—1206.

LEGISLATIVE CLERK.—INSUFFICIENT EVIDENCE.—The defendant was principal clerk of the house of representatives, and was indicted for negligently permitting a bill, which had not been passed, to be delivered to the enrolling clerk to be enrolled. The evidence showed that 361 bills were signed that day, including the one in question; that defendant was the custodian of the bills and kept them in his office, but had to leave his office frequently; that he had four or five assistant clerks and that members of the general assembly and other persons had access to his office; that the bill in question was tabled and so marked on the back and was seen in the hands of the defendant after being marked, and that the copyist who enrolled the bill did not receive it from the defendant and did not notice its endorsement and that defendant did not speak to her concerning the bill. Subsequently the bill was ratified and appeared on the statute books: *Held*, that the evidence was not sufficient to warrant a verdict of guilty. Satterfield, 121—558.

BREAKING DOORS TO ARREST.—An officer armed with process on a breach of the peace may, after demanding and being refused by the occupant admittance into the house for the purpose of making the arrest, lawfully break the doors in order to effect an entrance, and if he act in good faith both he and his *posse comitatus* will be protected. Mooring, 115—709.

WHEN OFFICER INDICTABLE.—An officer who has to exercise his judgment or discretion is not liable *criminally* for any error which he commits, *provided he acts honestly*; but any officer, whether judicial or ministerial, who acts corruptly, is responsible, both civilly and criminally, whether he acts under the law or without the law. Powers, 75—281.

SPECIAL OFFICER MUST SHOW WARRANT.—An officer appointed for a special purpose ought to show his warrant if demanded, but a known officer need not show his warrant when he makes the arrest. Curtis, 2 (1 Hay.), 543.

ACCUSED INFORMED OF CAUSE OF ARREST.—On making an arrest the officer should briefly inform the party arrested of the cause of arrest. Curtis, 2 (1 Hay.), 543.

CLERKS SUPERIOR COURT.

Sec. 439 (79). Penalty for acting without qualifying. R. C., c. 19, s. 16. 1777, c. 115, ss. 4, 61. 1827, c. 9, s. 5.

If any clerk shall enter on the duties of his office, before he executes and delivers to the authority entitled to receive the same, the bond required by law, he shall be guilty of a misdemeanor.

Sec. 440 (81). To receive official papers, etc. C. C. P., s. 142.

Immediately after he shall have given bond and qualified as aforesaid, he shall receive from the late clerk of the superior court all the records, books, papers, moneys and property of his office, and give receipts for the same, and if any clerk shall refuse, or fail within a reasonable time after demand to deliver such record-books, papers, money and property, he shall be liable on his official bond for the value thereof, and be guilty of a misdemeanor.

Sec. 441 (88). Solicitor to examine records. C. C. P., s. 147.

At every regular term of the superior court, the solicitor for the judicial district shall inspect the office of the clerk and report to the court in writing. If any clerk, after being furnished with the necessary books, shall fail to keep them up as required by law, he shall be guilty of a misdemeanor, and the solicitor shall cause him to be prosecuted for the same. If any solicitor shall fail or neglect to perform the duty hereby imposed on him, he shall be liable to a penalty of five hundred dollars to any person who shall sue for the same.

Sec. 442 (713). Clerk to publish an annual statement. 1868. c. 20, s. 19.

The clerk shall annually, on or within five days next before the first Monday of December, make out and certify, and cause to be posted at the court-house, and published in a newspaper printed in the county, if there be one, for at least four weeks, a statement for the preceding year, showing:

(1) The amount, items and nature of all compensation audited by the board to the members thereof severally;

(2) The number of days the board was in session, and the distance traveled by the members respectively in attending the same;

(3) Whether any unverified accounts were audited, and if any, how much and for what.

Sec. 443 (714). Neglect of clerk to publish statement a misdemeanor. 1868, c. 20, s. 20.

Any clerk who intentionally neglects to post and publish the statement required by the preceding section, or knowingly posts and publishes a false statement, shall be guilty of a misdemeanor.

Sec. 444 (765). Failure of clerk or other officer to perform requirements of this Code a misdemeanor. 1879, c. 96, s. 6.

If any clerk, justice of the peace, sheriff, register of deeds, constable, commissioner, county treasurer, or other county officer, shall neglect to perform any of the requirements of this Code, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court.

EVIDENCE—PRESUMPTION.—Where a clerk of the superior court is indicted for failure to pay over a license tax, and the failure to pay is admitted, the law raises a presumption that such failure is *wilful*, and it is incumbent on defendant to rebut the presumption. Heaton 77—505.

Sec. 445. Clerks to make annual report of funds in their hands. 1891, c. 580.

Clerks of the superior courts shall make an annual report of all public funds which may be in their hands on the first Monday in December of each and every year, or oftener if required by order of the board of commissioners or any other lawful authority, which report shall include a statement of all funds in the hands of said clerks by virtue or color of their office, and which may belong to persons or corporations. The said report shall be made to the board of county commissioners and shall be addressed to the chairman thereof, and the said report shall give an itemized statement of said funds so held, with the date and source from which it was received, and the person to whom due, how invested and where, and in whose name deposited, giving the date of any certificate of deposit, or other evidence of investment of said fund, and the rate of interest the same is drawing, and said report shall be subscribed and verified by the oath of the party making the same before any person allowed to administer oaths. Any clerk who shall fail to make said report, or shall wilfully and falsely swear to the same shall be guilty of a misdemeanor.

Sec. 446 (123). Punishment of the clerk of the superior court on conviction of an infamous crime. 1868-'9, c. 201, s. 53.

Upon the conviction of any clerk of the superior court of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state.

FORFEITURE OF OFFICE HOW ENFORCED.—The forfeiture of office can not be enforced by a judgment upon conviction in a criminal action, but can only be enforced by a proceeding in the nature of a *quo warranto*. Norman, 82—687.

Sec. 447 (3740). Clerks required to keep posted the fee bill.

Every clerk shall keep posted in his office the fee bill for public inspection and reference, in some conspicuous place, under a penalty of one hundred dollars for such neglect, to be paid to any person who will sue for the same; and shall also be guilty of a misdemeanor.

Sec. 448. Criminal court clerks to furnish list of fines to board of education. 1889, c. 199, s. 38.

The clerks of all criminal courts shall furnish, immediately upon the close of the term, to the board of education of the county a detailed statement of fines, forfeitures and penalties which go to the school fund that have been imposed or which have accrued during the terms. Any clerk failing to comply with the duties herein prescribed shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned at the discretion of the court.

Sec. 449. Clerks to keep record of justices of the peace; failure a misdemeanor. 1893, c. 52.

SECTION 1. The clerk of the superior court of each county shall record in a book to be kept for that purpose the names of all the justices of the peace for the several townships of his county, with the dates of each one's appointment, his qualification and the expiration of his term of office; and whenever a vacancy occurs it shall be noted therein.

SEC. 2. These books shall at all times show a complete list of the justices of the peace of the respective counties, and who was the predecessor of each justice and the succession in office.

SEC. 3. The clerk of the superior court of each county shall also record in a book to be kept for that purpose the names of all grand and petit jurors and talesmen who shall serve in his court, beginning with the term next following the passage of this act.

SEC. 4. The clerk shall be paid by the county a fee of five cents for recording the name of each justice of the peace and each juror.

SEC. 5. The books above mentioned shall be supplied to the clerks by the board of commissioners of the respective counties at the expense of the county.

SEC. 6. Wilful or negligent failure on the part of the clerk to discharge the duties imposed upon him by this act shall be deemed a misdemeanor.

COUNTY COMMISSIONERS.

Sec. 450 (711). Neglect of duty by commissioner a misdemeanor. 1868, c. 20, s. 17.

Any commissioner who shall neglect to perform any duty required of him by law as a member of the board, shall be guilty of a misdemeanor, and shall also be liable to a penalty of two hundred dollars for each offence, to be paid to any person who shall sue for the same.

Sec. 451 (1879). Commissioner's liability as surety, when. 1869-'70, c. 169, s. 6.

Every commissioner who approves an official bond, which he knows or believes to be insufficient in the penal sum, or in the security thereof, shall be liable as if he were a surety thereto, and may be sued accordingly by any person having a cause of action on said bond.

Sec. 452 (1880.) Commissioner also liable to indictment. 1869-'70, c. 169, s. 7.

Every commissioner liable as in the last section prescribed shall be moreover liable to a criminal action, and, on conviction, shall be removed from office and forever disqualified from holding or enjoying any office of honor, trust or profit under the state.

Sec. 453 (1881). Record of the board conclusive evidence of the facts stated therein. 1869-'70, c. 169, s. 8.

In all actions under the two preceding sections, a copy of the proceedings of the board of commissioners in the particular case, certified by their clerk under his hand and seal of the county, shall be conclusive evidence of the facts in such record alleged and set forth, but any commissioner may cause his written dissent to be entered on the records of the board.

SHERIFFS AND CONSTABLES.

Sec. 454 (1112). Sheriffs, constables or other officers failing to execute process, making a false return thereon, or refusing to discharge any other duties, indictable. R. C., c. 34, s. 118. 1818, c. 980, s. 3. 1827, c. 20, s. 4.

Any sheriff, constable or other officer, whether state or municipal, refusing or neglecting to return any precept, notice or process, to him tendered or delivered, which it is his duty to execute, or making a false return thereon; or any person who shall presume to act as any such officer, not being by law authorized so to do, shall forfeit and pay to any one who will sue for the same one hundred dollars, and shall moreover be guilty of a misdemeanor.

MAILING PROCESS.—Proof that a writ was directed by the clerk to the sheriff of another county, and mailed in due time to reach him in the regular course of the mail, is sufficient to authorize the entering of a judgment for an amercement, *nisi*, if there be no return of the process. Latham, 51 (6 Jones), 233.

FAILURE TO EXECUTE.—A constable who neglects or refuses to execute criminal process lawfully issued and placed in his hands is indictable. Ferguson, 76—197.

RETURN MADE BY DEPUTY.—A sheriff may be indicted for a false return made by his deputy. Johnston, 2 (1 Hay.), 338.

ONLY ONE BIDDER AT SALE.—On indictment of a sheriff for false return to an execution in returning no sale for want of bidders, it appeared that only one person bid at the sale, and the sheriff had been advised that he could not legally sell unless there were two bidders at least: *Held*, that defendant was guilty, since if more than one bid was necessary the defendant in the execution could always prevent satisfaction by simply having a friend to bid more than the property was worth at the first bid. Johnston, 2 (1 Hay.), 338; Joyce, 2 (1 Hay.), 54.

Sec. 455 (1179). Sheriff to indorse on process and subpoenas day of receipt and execution. R. C., c. 35, s. 10. 1850, c. 57.

Every sheriff shall indorse on all process and subpoenas issuing in criminal cases, whether for the state or defendant, the day when such process and subpoenas came to hand, and also the day of their execution; and on failure of any sheriff to perform either of said duties, he shall forfeit and pay the sum of ten dollars for every case of neglect, to be recovered for the use of the state, in the same manner as forfeitures are recovered against sheriffs by parties in civil suits, for failure to make due return of process delivered to them.

Sec. 456 (516). Liability of officer making levy, refusing, or neglecting to lay off homestead. 1868-'9, c. 137, s. 17.

Any officer making a levy, who shall refuse or neglect to summon and qualify appraisers as heretofore provided, or who shall fail to make due return of their proceedings, or who shall levy upon the homestead set off by said appraisers or assessors, (as the case may be) except as herein provided, shall be liable to indictment for a misdemeanor, and he and his sureties shall be liable to the owner of said homestead for all costs and damages in a civil action.

Sec. 457. Sheriffs may administer oath when justified bond required. 1889, c. 529.

In all cases where the law requires a sheriff to take justified bond, the said sheriff is hereby authorized to administer oaths in such cases.

Sec. 458 (2092). Publication of delinquent tax-payers required. 1876-'7, c. 78, ss. 1, 2, 3.

Whenever any sheriff or tax-collector shall be credited on settlement with any tax or taxes, by him returned as insolvent, dead or removed, he shall forthwith make publication at the court-house door, and at least one public place in each and every township in his county, of a complete list of the names of such insolvent, dead or removed delinquents, with the amount of the tax due from each, and the sum total so credited. Such list, by order of the board of commissioners, may also be published in any newspaper printed in the county; in which case, the expense of the advertisement, for such time as may be directed, shall be paid by the county. Any sheriff, or tax-collector failing to comply with the provisions of this section, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than ten, nor more than one hundred dollars.

Sec. 459 (3432). Within what time sheriff shall send convict to the penitentiary. 1869-'70, c. 180, s. 3.

The sheriff, having in charge any prisoners sentenced to the penitentiary, shall proceed to send the same to the penitentiary or place of assignment, within five days after the adjournment of the court at which they were sentenced: *Provided*, no appeal has been taken.

Sec. 460 (3435). Compensation to sheriffs for conveying convicts to penitentiary. 1874-'5, c. 107, s. 1.

The sheriffs of the several counties shall be allowed two dollars per day, and actual necessary expenses for conveying convicts to the penitentiary or place of assignment; also one dollar per day and actual necessary expenses for each guard, not to exceed one guard for every three prisoners, as the sheriff upon affidavit before the clerk of the superior court of his county shall swear to be necessary for the safe conveyance of said convicts.

Sec. 461 (3436). Sheriff to be paid by state treasurer on warrant of auditor. 1874-'5, c. 107, s. 2.

Upon filing such affidavit with the auditor, together with a fully itemized account, to be sworn to before the auditor, of the number of days requisite for coming and returning, and of the actual expenses for conveying said convicts, and of the guard necessary for their safe keeping, the auditor shall be required to audit such verified claims of the sheriff, and the treasurer to pay all such warrants properly drawn upon him out of any moneys in the treasury not otherwise appropriated.

Sec. 462 (3437). Sheriff to file copy of verified account with the board of commissioners of his county. 1874-'5, c. 107, s. 3.

The sheriff shall file with the board of commissioners of his county a copy of his affidavit as to necessary guard, together with a copy of his itemized account of expenses, both certified to by the auditor as true copies of those on file in his office, or be guilty of a misdemeanor.

JAILER.

Sec. 463 (3463). Prisoners may buy necessaries; penalty on jailers for injuring prisoners. R. C., c. 87, s. 8. 1795, c. 433, s. 6.

Prisoners shall be allowed to purchase and procure such necessaries, in addition to the diet furnished by the jailer, as they may think proper; and to provide their own bedding, linen and clothing without paying any perquisite to the jailer for such indulgence; and if the keeper of a jail shall do, or cause to be done, any wrong or injury to the prisoners committed to his custody, contrary to this chapter, he shall not only pay treble damages to the person injured, but shall be guilty of a misdemeanor.

Sec. 464 (3471). Prisoners to be confined in proper apartments; penalty for confining otherwise. R. C., c. 87, s. 16. 1795, c. 433, s. 4.

The sheriff or jailer shall confine those committed to his custody in the apartment, provided and designated by law for persons of the description of the prisoner, and if a sheriff or jailer, wantonly or unnecessarily otherwise confine prisoners in his custody, it shall be a misdemeanor in office.

Sec. 465 (3456). Keepers of jails to receive and keep prisoners of United States; fees same as for state prisoners. R. C., c. 87, s. 1. 1790, c. 322, ss. 1, 2.

When a prisoner shall be delivered to the keeper of any jail by the authority of the United States, such keeper shall receive the prisoner and commit him accordingly, and every keeper of a jail refusing or neglecting to take possession of a prisoner delivered to him by the authority aforesaid, shall be subject to the same pains and penalties as for neglect or refusal to commit any prisoner delivered to him under the authority of the state. And the allowance for the maintenance of any prisoner committed as aforesaid, shall be equal to that made for prisoners committed under the authority of the state.

OFFICERS—GENERALLY.

Sec. 466. Officer, resistance to or refusal to aid misdemeanor. 1889, c. 51.

Any person who wilfully and unlawfully resists, delays or obstructs a public officer in discharging or attempting to discharge a duty of his office shall be guilty of a misdemeanor.

Any person who, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, wilfully neglects or refuses to aid such officers shall be guilty of a misdemeanor.

INDICTMENT—MISJOINDER.—An indictment contained two counts, the first against one defendant for obstructing an officer in the discharge of his duty, and the second against three other persons for refusing to aid the officer. There was a verdict of not guilty on the first count, but guilty on the second, and the defendants named in the second count moved in arrest of judgment because of misjoinder in the counts: *Held*, that if the objection had been made in apt time it might have been good, unless the state had entered a *not pros.* as to one count, but it came too late after verdict. *Perdue*, 107—853.

It is not necessary that an indictment, under this statute or at common law, for resisting an officer, should set out the warrant or the name of the person the officer was attempting to arrest when resisted. *Dunn*, 109—.

Sec. 467 (1882). Penalty on officers acting without giving bond. 1869-'70, c. 169, s. 9. R. C., c. 78, s. 8.

Every person or officer of whom an official bond is required, who shall presume to discharge any duty of his office before executing such bond in the manner prescribed by law, is liable to a forfeiture of five hundred dollars to the use of the state for each attempt so to exercise his office, and is moreover liable to a criminal action, and upon conviction shall be ejected from office and be forever disqualified from holding or enjoying any office of honor, trust or profit under this state.

Sec. 468 (517). Liability of officer, appraiser or assessor conspiring with debtor. 1868-'9, c. 137, s. 18.

Any officer, appraiser or assessor (as the case may be), who shall wilfully or corruptly conspire with any judgment debtor or other appraiser or assessor (as the case may be), to undervalue the homestead or personal property exemption of such debtor, or shall assign false metes and bounds, or make or procure to be made a false and fraudulent return thereof, shall be liable to indictment for a misdemeanor, and shall be answerable to the judgment creditor for all costs and damages in a civil action.

Sec. 469 (518). Liability of officer, appraiser or assessor conspiring with creditor. 1868-'9, c. 137, s. 19.

Any officer, appraiser or assessor who shall wilfully or corruptly conspire with any judgment creditor, or other appraiser or assessor, to overvalue the homestead or personal property exemption of any debtor or applicant, or shall assign false metes

and boundaries, or make, or procure to be made, false and fraudulent returns thereof, shall be liable to indictment for a misdemeanor, and shall be answerable to the party injured for all costs and damages in a civil action.

Sec. 470 (1009). County claims; speculation in, indictable. 1868-'9, c. 260.

If any clerk, sheriff, register of deeds, county treasurer, or other county, city, town or state officer shall engage in the purchasing of any county, city, town or state claim at a less price than its full and true value, or at any rate of discount thereon, or be interested in any speculation in any such claims, he shall be guilty of a misdemeanor, and fined or imprisoned, and also shall be liable to removal from office at the discretion of the court.

Sec. 471 (1011). Directors, commissioners and other public officers forbidden to become contractors. R. C., c. 34, s. 38. 1825, c. 1269. 1826, c. 29.

No person, appointed or elected a commissioner or director to discharge any trust wherein the state or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another; and any person so offending shall be guilty of a misdemeanor.

Sec. 472 (2713). Violence against officers of election for the purpose of breaking up election. R. C., c. 34, s. 37.

Any person who, by force and violence, shall break up or stay any election, by assaulting the officers thereof, or depriving them of the ballot boxes, or by any other means, his aiders and abettors, shall be guilty of a misdemeanor, and imprisoned three months, and pay such fine as the court shall adjudge, not exceeding one hundred dollars.

Sec. 473 (2707). Penalty on officers for non-performance of duty in regard to elections. R. C., c. 34, s. 13. 1871-'2, c. 185, s. 29. 1876, c. 275, s. 38.

Any registrar or judge of election, or any county canvasser or commissioner, register of deeds, clerk or sheriff, failing or neglecting to make the returns and perform the duties required of him, shall be fined not less than five hundred nor more than one thousand dollars, or imprisoned not more than six nor less than two months, at the discretion of the court; and every such officer for every such offence shall forfeit and pay the sum of five hundred dollars, to be recovered in the name and to the use of the state,

on motion of the attorney-general in the superior court of Wake county, ten days' previous notice in writing of such intended motion having been given to such officer by the secretary of state. The proceeding thereon shall be summary, and if any matter of fact shall be in issue, the same shall be tried at the first term; and on such trial, or for any other purpose in the prosecution of such motion to judgment, the certificate of the secretary of state, or of the governor, as the case may be, of the particular default on which the motion is founded, shall be received as competent *prima facie* evidence to prove the same.

Sec. 474 (2708). Wilful or malicious neglect of officers to perform their duties. R. C., c. 34, s. 114.

If any sheriff, or returning officer whatever, shall wilfully, or of malice, neglect to perform any duty, act, matter or thing, required or directed, in the time, manner and form in which such duty, act, matter or thing is required to be performed in relation to the election and returns thereof, of the governor, of representatives in congress, of justices of the supreme court, of judges of the superior court, of solicitors, or of the electors of president and vice-president of the United States, the person so offending shall be guilty of a felony, and fined not less than one thousand nor more than five thousand dollars, and be imprisoned not less than one nor more than three years; and shall be disabled from holding any office of profit or trust under the authority of the state.

REFUSING TO ALLOW A VOTER TO REGISTER.—A registrar of an election who refuses to allow a voter to register, on the ground that the town charter under which such registrar is acting requires the payment of all taxes due the city as a qualification for voters, and that such voter has not paid his town taxes, can not be convicted, though that part of the charter which requires the payment of town taxes as a qualification for voters may be unconstitutional, since nothing can be inferred against him for assuming that the charter is valid. Powers, 75—281.

Sec. 475 (1119). Treasurer of the state, fraudulent entries and statements by, a misdemeanor. R. C., c. 34, s. 68.

If the treasurer of the state shall wittingly or falsely make, or cause to be made, any false entry or charge in any book kept by him as treasurer, or shall wittingly or falsely form or procure to be formed, any statement of the treasury, to be by him laid before the governor, the general assembly, or any committee thereof, to be by him used in any settlement which he is required to make with the auditor, with intent, in any of said instances, to defraud the state or any person, such treasurer shall be guilty of a misdemeanor, and fined at the discretion of the court, not exceeding three thousand dollars, and imprisoned not exceeding three years.

OFFICES—BUYING AND SELLING.

Sec. 476 (998). Buying and selling offices. R. C., c. 34, s. 33. 5, 6 Edw. VI., c. 16. ss. 1, 5.

If any person shall bargain or sell an office or deputation of an office, or any part or parcel thereof, or shall take money, reward, or other profit, directly or indirectly, or shall take any promise, covenant, bond or assurance for money, reward or profit, for an office or the deputation of an office, or any part thereof, which office or any part thereof shall touch or concern the administration or execution of justice, or the receipt, collection, control, or disbursement of the public revenue, or shall concern or touch any office or ship in any court of record wherein justice is administered; or if any person shall give or pay money, reward or profit, or shall make any promise, agreement, bond or assurance for any of the said offices, or for the deputation of any of them, or for any part of them, the person so offending in any of the cases aforesaid shall be guilty of a misdemeanor, and on conviction thereof, shall forfeit all his right, interest and estate in such office, and every part and parcel thereof, and shall be imprisoned and fined at the discretion of the court.

 OLEOMARGARINE.

Sec. 477. Sale of oleomargarine and butterine without label a misdemeanor. 1895, c. 106.

SECTION 1. For the purpose of this act the word "butter" shall be understood to mean the product manufactured and compounded from fresh and pure milk and cream.

SEC. 2. For the purpose of this act any article manufactured or compounded in imitation or semblance of butter, as defined in section one of this act, which shall be composed of any ingredient or ingredients in combination with butter, shall be known as "oleomargarine" and "butterine," and it shall be unlawful to manufacture, keep for sale, offer for sale, export or import same, except in accordance with the provisions of this act.

SEC. 3. Every manufacturer of said "oleomargarine" and "butterine" shall securely affix by pasting on each package, tub or firkin thereof so manufactured by him a label, on which shall be printed

in large roman type the chemical ingredients and the proportions thereof. Every manufacturer of such compound who neglects to affix such label to any package, tub or firkin containing such compound manufactured, sold or offered for sale by him, and every person who removes such label so affixed from any such package, tub or firkin shall be guilty of a misdemeanor and punished as hereinafter provided.

SEC. 4. This act shall not be construed as to prohibit the manufacture or sale of said compound, or in any degree violate the provisions of the interstate commerce law relative to this particular subject. The said compound, however, shall not be manufactured, sold, nor offered for sale, except in accordance with the provisions of this act.

SEC. 5. It shall be the duty of the district, county and city attorneys, upon proper information that any of the provisions of this act have been violated, to prosecute such offender before any court of jurisdiction, and upon conviction thereof shall be punished by a fine of not less than fifty dollars, or by imprisonment in the county jail not exceeding thirty days; and for each subsequent offence by a fine not less than two hundred dollars or by imprisonment not less than six months or both in the discretion of the court.

OUTLAWRY.

See also FUGITIVES—EXTRADITION.

Sec. 478 (1131). *Felons fleeing from justice, outlawed.* 1866, c. 62. 1868-'9, c. 178, sub chap. 1, s. 8.

In all cases where any two justices of the peace, or any judge of the supreme, superior or criminal courts, shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest, and service of the usual process of law, the said judge, or the said two justices, being justices of the county wherein such person is supposed to lurk or conceal himself, are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also, when issued by any judge, empowering and requiring

the sheriff of any county in the state in which said fugitive shall be, and when issued by two justices empowering and requiring the sheriff of the county of said justices, to take such power with him as he shall think fit and necessary for going in search and pursuit of, and effectually apprehending such fugitive from justice, which proclamation shall be published at the door of the court-house of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the judge or justices shall direct; and if any person against whom proclamation hath been thus issued, continue to stay out, lurk and conceal himself, and do not immediately surrender himself, any citizen of the state may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation or impeachment of any crime.

Sec. 479 (3245). Three justices may order out militia to suppress outlawed persons. R. C., c. 70. s. 83. 1831, c. 32, s. 4. 1869-'70, c. 164.

When there may be outlawed persons, committing depredations, or in any way alarming the citizens of any county, or where the guarding of a jail is necessary, three justices of the peace, certifying the same in writing and requesting the officer in command of their county, such officer shall effect the object set forth in said request of the justices, and the expenses of the militia so called out shall be paid by the county commissioners, who may lay a sufficient tax to pay said militia, at the same rates as the regular troops of the United States are entitled to when in actual service.

OVERSEER.

See **ROADS.**

OYSTERS.

Sec. 480 (3392). County commissioners to cause surveys to be made, etc. 1883, c. 332, s. 4.

The board of county commissioners may in their discretion cause to be made, not oftener than once in twelve months a sur-

vey and examination of any or every such oyster or clam bed or garden in their county, the result of which examination or survey shall be reported under oath to the clerk of the superior court; and if it be found that the holder of such license as aforesaid has included within his stakes any natural oyster or clam bed, or a space containing more than ten acres, he shall forfeit such license and all the rights and privileges thereto belonging: further, if the holder of such license fail for the space of two years either to use such bed or to keep it properly designated by stakes, he shall forfeit such license and all the rights and privileges therein granted.

Sec. 481 (3393). Penalty for injuring beds; misdemeanor. 1883, c. 332, s. 5.

If any person shall do any injury to such beds or to the stakes thereof, or shall gather or take away any oysters or clams within the lines of the stakes aforesaid without permission first had from the owners thereof, he shall forfeit for each offence the sum of ten dollars, and if any person shall commit any such offence in the night time, he shall forfeit for each offence the sum of twenty-five dollars, and the penalties herein created may be recovered by a warrant before a justice of the peace by any person who may sue therefor; and, in addition to the penalties already prescribed in this section, such offender shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not more than thirty days.

DEFINITION OF NATURAL OYSTER BED.—"A natural oyster bed" as distinguished from an "artificial oyster bed" in the sense in which those terms are employed in The Code, is defined to be one not planted by man, and is any shoal, reef or bottom where oysters are to be found growing, not sparsely or at intervals, but in a mass or *stratum* in sufficient quantities to be valuable to the public. Willis, 104—764.

Sec. 482. Oysters, non-residents prohibited from dredging. 1889, c. 413.

No non-resident shall use any scoop or dredger for the purpose of taking or catching oysters anywhere in the waters of this state.

No person shall use any scoop or drag other than such tongs as are generally used for that purpose for taking or catching oysters nearer than one mile of any stand or shad-nets located in the waters of the Pamlico sound.

Any person violating this act shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days.

Sec. 483. Unlawful to take oysters with dredges. 1891, c. 11.

It shall be unlawful for any person or persons to take or catch oysters from any of the public grounds or natural oyster beds of

North Carolina with any dredge, drag, scoop, patent tongs or other instrument except such tongs as are worked with the hands and in ordinary use among our oystermen; and if any person or persons shall use in the catching or taking of oysters from the public grounds or natural oyster beds of the state any such instrument as is forbidden by this act, he or they shall be guilty of a misdemeanor, and upon conviction shall be fined not more than five nor less than one thousand dollars or imprisoned not more than five nor less than one year or both in the discretion of the court.

Whenever any person shall be found engaged in the violation of the laws of this state in relation to fish and oysters, it shall be the duty of any and every officer charged with the execution of the laws of the state, or any person specially deputed or commanded for this purpose, to forthwith arrest such person and carry him before some magistrate, who shall inquire into the facts, examine the witnesses and dispose of the case in the manner required by law; and every citizen may likewise make such arrest and carry the offender before such magistrate, and the officers hereinbefore mentioned may make such arrests in any county in North Carolina as well as in his own.

The decision of the board of shell-fish commissioners fixing the location of the public grounds under the provisions of c. 119, acts of 1887, is final where there was no protest or appeal and in the absence of fraud or mistake; and an entry and grant of a natural oyster bed not included in the boundaries fixed by the board can not be vacated on the ground that such bed was not subject to entry. Spencer, 114—770.

Where a grant has been issued in strict compliance with the law, rights of property are acquired which can not be taken away, even by the state, in the absence of any allegation of fraud or mistake, except after compensation and under the principal of eminent domain. Spencer, 114—770.

PARDON.

Sec. 484 (3336). Application for pardon, what to contain. 1869-'70, c. 171, s. 1. 1870-'1, c. 61, s. 1.

Every application for pardon must be made to the governor in writing, signed by the party convicted, or by some person in his behalf. And every such application shall contain the grounds and reasons upon which the executive pardon is asked, and shall be in every case accompanied by a certified copy of the indictment, and the verdict and judgment of the court thereon.

CONVICTION.—The term "conviction" as used in Const. N. C., art. 3, sec. 6, authorizing the governor to grant pardons "after conviction" for all offences, denotes a verdict of guilty rendered by the jury; and a pardon granted after appeal taken to the supreme court from the judgment after verdict of guilty in the court below, is valid. Pearson, C. J., *dissenting*. Alexander, 76—231.

EFFECT OF PARDON AS TO COSTS.—Fees due officers of the court are vested rights by law, and are not discharged when a defendant receives an unconditional pardon from the governor after conviction and sentence. Mooney, 75—98.

WHEN POWER EXERCISED.—Where the punishment is in the discretion of the trial judge it is to be presumed that the power to pardon will be exercised only in extreme cases. McIntyre, 46 (1 Jones), 1.

VOID FOR MISTAKE.—Where upon the face of the pardon it appears that the governor supposed that defendant had been fined as well as imprisoned, and the imprisonment is remitted provided the fine be first paid, when in fact defendant had not been fined, this mistake as to fact renders the pardon void. McIntyre, 46 (1 Jones), 1.

APPEAL PENDING.—A pardon by the governor, after conviction, and while an appeal is pending in the supreme court, is valid. Alexander, 76—231.

DISTINCTION BETWEEN PARDON AND AMNESTY.—A pardon is granted by the governor to one who is guilty, either before or after conviction; amnesty is granted by the legislature to those who may be guilty, and this is done generally in classes and before trial. Blalock, 61 (Phil.), 242.

PEACE WARRANT.

Sec. 485 (894). Proceedings on peace warrant. 1879, c. 92, s. 9.

Whenever any person complained of on a peace warrant shall be brought before a justice of the peace, such person may be required to enter into a recognizance, payable to the state of North Carolina in such sum not exceeding one thousand dollars, as such justice shall direct, with one or more sufficient sureties, to appear before some justice of the peace within a period not exceeding six months, and not depart the court without leave, and in the meanwhile to keep the peace and be of good behavior towards all the people of the state, and particularly towards the person requiring such security.

NO APPEAL.—No appeal lies from the order of a justice of the peace requiring defendant in a peace warrant to enter into a recognizance to keep the peace. Walker, 94—857.

No appeal lies from the judgment of a justice of the peace requiring defendant to give bond to keep the peace. Lyon, 93—575.

Defendant, on appeal to the superior court, moved to quash the proceeding for want of sufficient averment in the affidavit upon which the warrant was issued, but, upon motion of the solicitor, the appeal was

dismissed: *Held*, no error, since the appeal did not lie. Gregory, 118—1199.

MAY BE WORKED ON ROADS.—One who fails to enter into bond to keep the peace or for good behavior may be worked on the public roads. Yandle, 119—874.

WARRANT.—A peace warrant in which is alleged no threat, nor fact or circumstance from which the court can determine whether the fear of the prosecutor is well founded, should be quashed. Cooley, 78—538.

A peace warrant which simply alleges that the prosecutor "has reason to fear and doth fear" that defendant will do him serious bodily injury, is fatally defective for failure to allege a threat, fact, or circumstance from which the court can see that the fear of the prosecutor is well founded. Goram, 83—664.

BOND CAN NOT BE TAKEN BY OFFICER MAKING ARREST.—A sheriff has no right to take a recognizance to keep the peace from a person arrested by him for a breach of the peace, or committed to his custody for want of sureties for keeping the peace. Hill, 25 (3 Ired.), 398.

JURISDICTION.—Where defendant is required by a justice of the peace to enter into a recognizance in the sum of \$300 on a peace warrant, and the justice afterwards issues a notice to the sheriff reciting the fact that defendant had violated the conditions of the recognizance, and commanding him to make known to defendant that he appear before said justice to show cause why the recognizance should not be declared forfeited on a certain day, and, in default of defendant's appearance, declares it forfeited and orders it prosecuted according to law, there is no error, and the recognizance may be prosecuted in the court having jurisdiction. Oates, 88—668.

PEDDLING.

Sec. 486 (1091). Peddling without license. R. C., c 34, s. 44. 1835, c. 17, s. 3. 1889, c. 504.

If any person shall unlawfully hawk or peddle any goods, wares or merchandise, or shall fail, upon the application of the sheriff or his deputy, or any justice of the peace, to show his license as required by law, he shall be guilty of a misdemeanor, and the punishment for every such offence shall not exceed a fine of fifty dollars or imprisonment for thirty days.

SPECIAL VERDICT.—A special verdict which fails to find whether or not defendant had a license, or that he was required to exhibit one and failed to do so, is fatally defective, and a new trial will be awarded. Crump, 104—763.

MANUFACTURER.—One who merely mixes and boils certain drugs and medicines and sells them under the name of "Herbs of Life," is not entitled to the exemption from the payment of a peddler's tax given to persons who sell goods of their own manufacture, under Rev. Laws 1887, c. 135, sec. 23. Morrell, 100—506.

WHO IS A PEDDLER.—A peddler is one who sells and delivers the identical goods he carries about with him. Lee, 113—681.

SELLING RANGES BY SAMPLE.—One who sells ranges by sample and by taking orders for goods to be thereafter delivered and paid for, is not indictable for failure to pay the tax imposed upon the business of peddling ranges, etc., by sec. 28, c. 294, acts of 1893. Lee, 113—681.

PRIVILEGE ONLY.—Peddling is not a matter of right, but it is a privilege, and it is discretionary with the county commissioners whether they will grant a license. Rhyne, 119—905.

PRIVILEGE PERSONAL.—The permission to sell articles of one's own manufacture is personal to the manufacturer, and does not extend to an agent employed to sell the goods. Rhyne, 119—905.

Sec. 487. Peddlers, affidavit of naturalization. 1885, c. 348.

No license shall be hereafter issued to any person to carry on the business of a peddler of goods, wares or merchandise, unless the applicant shall file with the officer issuing the same an affidavit made before some officer having authority to administer oaths, setting forth that such applicant is a native-born or naturalized citizen of the United States. Any person who shall procure license by swearing falsely to the statements contained in such affidavit shall, for each day during which he shall do business under such license, be guilty of a misdemeanor, and upon conviction thereof be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

PERJURY.

Sec. 488. Perjury, indictment. 1889, c. 83.

In indictments for perjury the following form shall be sufficient in form and substance, to-wit: The jurors for the state on their oath present, that A B, of _____ county, did unlawfully commit perjury upon the trial of an action in _____ court, in _____ county, wherein _____ was plaintiff and _____ was defendant, by falsely asserting, on oath (or solemn affirmation) (here set out the statement or statements alleged to be false), knowing the said statement, or statements, to be false, or being ignorant whether or not said statement was true.

INDICTMENT—QUASHING.—An indictment which fails to allege that defendant "knew said statement to be false," or that he was "ignorant whether or not said statement was true," is defective, but such defect would not warrant the court below in quashing the indictment, the proper

course being for the court to hold the prisoner and permit the solicitor to send a new bill. Flowers, 109—.

A conclusion "against the form of the statute in such case made and provided and against the peace and dignity of the state," is mere surplusage. Peters, 107—876.

The omission to charge any time in the indictment is no ground for arrest of judgment. Peters, 107—876.

The omission of the word "feloneously" is a fatal defect. Shaw, 117—764.

A motion in arrest of judgment on the ground that the indictment does not specifically charge that the matters alleged to be sworn to were wilfully, absolutely and falsely in a matter material to the point in issue can not be sustained. Thompson, 113—638.

INDICTMENT BEFORE 1889.—The omission to formally negative the truth of the alleged false testimony is not sufficient ground for arrest of judgment where such allegation sufficiently appears by necessary implication from other parts of the indictment. Murphy, 101—697.

An omission to charge that the oath was *wilfully and corruptly* taken, is fatal, and the defect is not supplied by an averment that defendant "of his wicked and corrupt mind did commit wilful and corrupt perjury." Carland, 14 (3 Dev.), 115.

Where the indictment alleges the perjury to have been committed in an action in which the "state was plaintiff and A B defendant," and the warrant is entitled "State and City of G vs. A B," the words "and City of G" are mere surplusage. Peters, 107—876.

Where the perjury is alleged to have been committed on the trial of a criminal proceeding begun by a warrant, it is no defence that the warrant was issued without complaint or affidavit. Peters, 107—876.

An indictment charging that defendant "deposed and gave in evidence to the jury wilfully and corruptly," sufficiently avers that he *swore* falsely. Bobbitt, 70—81.

An indictment for perjury which fails to aver that the false oath was taken *wilfully and corruptly* is fatally defective. Davis, 84—787.

An indictment which alleges that the false oath was administered by a justice of the peace upon a coroner's inquest in the presence and at the request and direction of the coroner, the said justice then and there having sufficient power and authority to administer the said oath, is fatally defective. In such case the indictment should charged that the oath was administered by the coroner and that he had competent authority to administer it. Knight, 84—789.

Where the indictment states that the perjury as committed before a justice on a trial for the slander of an innocent woman, and that the justice had sufficient and competent authority to administer the oath, a motion in arrest of judgment on the ground that the indictment further charges that issue was joined and came on to be tried, when in fact the justice had no jurisdiction of the case, and no such issue could have been joined, can not be sustained. Roberson, 98—751.

Several assignments of perjury may be contained in one count of the indictment, and all of the several particulars in which the prisoner swore falsely may be embraced in one count, and proof of the falsity of any one will sustain the count. Bordeaux, 93—560.

CAPTION TO INDICTMENT.—A caption to an indictment is necessary only when the court acts under a special commission, since where the court sits by authority of a public law everybody must take notice of it, and

it is not necessary specially to set forth the power of the court. Warden, 4 (Taylor's Term Rep.), 596.

INDICTMENT FOR PERJURY COMMITTED BEFORE JUSTICE'S COURT.—An indictment under this section for perjury committed at a trial in a justice's court can not be quashed because the names of the justices are given in addition to the name of the court, since the addition of the names of the justices could not possibly prejudice the defendant, and is mere harmless surplusage. Indeed, it is probably better and certainly fairer to the defendant in such cases to give the name of the trial justice. Flowers, 109—.

Nor is it any objection to such indictment that the perjury is alleged to have been committed before two justices "acting and sitting together," and that no such tribunal is known to our constitution, since The Code, sec. 1159, authorizes two justices to sit together in criminal proceedings and gives them the same "powers and duties" as are given to a single justice, and this section of The Code is in pursuance of the provisions of the Constitution, art. 4, sec. 12, which empowers the legislature to "allot and distribute" the judicial power and jurisdiction which does not pertain to the supreme court "in such manner as they deem best." Flowers, 109—.

EVIDENCE.—Entries in the course of business, upon the books of a railroad company, made by one at the time an agent of the company, and still living, but absent from the state, are not competent evidence to show that certain cotton, in regard to which it was alleged that the perjury had been committed, had been received by defendant. Thomas, 64—74.

Where the perjury assigned is in falsely swearing in a bastardy proceeding that he, defendant, had never had sexual intercourse with the prosecutrix, and the prosecutrix testifies that she never had such intercourse with any other man than the defendant, her relations with others constitutes a part of her charge against defendant, and he has a right to show by a witness that he had been criminally intimate with her before the birth of the child. Jones, 91—629.

Parol evidence is competent to show that, on the trial of an action before a justice of the peace, a *not pros.* was entered as to one of the defendants, since a justice's court is not a court of record. Green, 100—419.

Where the perjury assigned is that defendant swore in a civil case that he never had been a member of a certain firm, he may show as a defence that no such firm existed. Smith, 119—856.

The fact that some of the state's witnesses testified that defendant told them that he was a member of the firm did not estop him from showing that he was not a member and that his statement to such witnesses was not correct. *Ibid.*

A certified statement of the register of deeds showing how much property was listed for taxation by defendant, not being a copy of such list, is incompetent. Section 1342 of The Code makes competent only copies of official records. Champion, 116—987.

Where the perjury assigned is that defendant falsely swore that he did not have an axe in a fight and the person assaulted testifies that defendant did have an axe with which he inflicted a wound on witness' head, testimony of a physician that the wound "was made with a sharp-edged instrument" is sufficient corroboration to establish the falsity of defendant's oath. Hawkins, 115—712.

TWO WITNESSES.—It is not necessary that the evidence should equal in weight the testimony of two witnesses, but it is sufficient if there is the testimony of one witness and corroborative circumstances sufficient

to turn the scale against the oath which is charged to have been false. Peters, 107—376.

Although the testimony of two witnesses is necessary to convict of perjury, yet the direct oath of one witness and proof of declarations of the prisoner inconsistent with the oath in which perjury is assigned, is sufficient. Moller, 14 (3 Dev.), 263.

The falsity of the oath must be proven by two witnesses, or by one witness and corroborative circumstances sufficient to turn the scales against the defendant's oath. Hawkins, 115—712.

JURISDICTION.—A man can not be convicted of perjury in swearing before a justice to his attendance in the superior court as a witness, since the clerk only is authorized to administer such oath. Wyatt, 3 (2 Hay.), 219.

Where the jurisdiction of the court is voidable by matter *de hors* the record, but no defect of authority appears upon an inspection of the record of an indictment, trial and conviction, such a record can not be collaterally impeached in a prosecution for perjury for taking a false oath in the course of the trial by showing that the jurisdiction might have been ousted though it was not defeated. Ridley, 114—827.

THE OATH.—Where a witness who swears with uplifted hand, though not conscientiously scrupulous of swearing on the Bible, deposes falsely, he is guilty of perjury. Whisenhurst, 9 (2 Hawks), 458.

Where a witness for the state testified that he "was present when the defendant *was sworn*," and that "*he swore*" on the trial in which the perjury is alleged to have been committed, there is no error in refusing an instruction that there was no evidence of the taking of an oath. Glisson, 93—506.

Where the indictment alleges that defendant was sworn "on the Holy Gospels of God," a charge that the jury might convict "if he was sworn in any manner known to the law," is erroneous. Davis, 69—383.

INTENT.—Where the perjury assigned is in falsely swearing on the trial of an assault and battery that a certain person struck defendant, when the proof is that he was not struck by such person but by another, it is competent for the defendant to show, in order to disprove a corrupt intent, that immediately on recovering from the unconsciousness occasioned by the blow, he had given the same account of the transaction he did in his testimony on the trial for the assault and battery. Curtis, 34 (12 Ired.), 270.

A person who takes the oath administered to an unchallenged voter to the effect that he is a "duly qualified voter," can not be convicted of perjury because at the time he had been convicted of larceny, but he might be convicted if he had taken the oath administered to challenged voters to the effect that he is "not disqualified from voting by the constitution and laws of this state." Houston, 103—383.

Although one *believes* the allegation to which he testifies, yet unless he has probable cause for such belief, he may be convicted of perjury. Knox, 61 (Phil. Law), 312.

AUTHORITY.—Perjury can not be committed on the trial of a motion to mark and tax a prosecutor with the costs of a criminal action in which the bill has been ignored by the grand jury, because the court has no authority to tax the prosecutor with the costs where the bill has been ignored. Gates, 107—832.

VARIANCE.—An allegation that the perjury was committed on the trial of an indictment charging A and *four* others with an assault on B, is not supported by the production of a record which sets forth a bill of indict-

ment charging A and *five* others with an assault on B. Harvell, 49 (4 Jones), 55.

Where the indictment charges false swearing before the mayor in a certain criminal proceeding against several persons, including "John Green," and the warrant introduced by the state did not contain the name of John Green, but contained the name of G. Green, the variance is fatal. Green, 100—547.

Where the perjury assigned is in giving false testimony in a bastardy proceeding against defendant, in which he testified in his own behalf, and the bill entitles the cause as constituted between the "state as plaintiff and the said J C as defendant," but the record shows that the mother was joined with the state as a party, there is no material variance, since the mother was not a necessary party to the action, and was improperly joined. Collins, 85—511.

Where the perjury assigned is in falsely swearing in a case against only one defendant, and the summons shows that the action was against two, but it is proven that a *not pros.* was entered as to the other defendant before the trial, there is no variance. Green, 100—419.

Where the indictment charges the perjury to have been committed on the trial of "Willis Fain" for larceny, and the record shows the name of "Willis Fanes," the case comes within the rule *idem sonans*, and there is no variance. Hare, 95—682.

Where the perjury assigned is the taking of a false oath at one term of a court in a trial between two persons, and the record shows that at that term there was no trial between the said parties, but that there was such a trial at another term, the variance is fatal. Lewis, 93—581.

Where the assignment of perjury is that defendant swore in an affidavit that he did not know that a writ had been returned against him in the above *suit* and the affidavit uses the word *case* instead of *suit*, the variance is immaterial. Caffey, 6 (2 Murph.), 320.

Where the allegation is that perjury was committed in an action wherein "one H was plaintiff and Thomas R. Robertson was defendant," and the proof is that "Thomas Robertson" was defendant, and there is evidence of the identity of Thomas Robertson and Thomas R. Robertson, the variance is not fatal, it being for the jury to determine the identity of the two persons. Hester, 122—1047.

ARREST OF JUDGMENT.—Where the indictment charges that the oath was administered, "the said B, justice of the peace, as aforesaid, having then and there competent authority and power to administer the said oath to the said C G," and it is denied that the justice had jurisdiction of the action, a motion in arrest of judgment on the ground that the indictment failed to allege that the oath was taken before a court of competent jurisdiction, is properly overruled. Green, 100—419.

Where defendant is charged with perjury in swearing he did not *execute* a certain deed, and the jury find specially that he is guilty of perjury in *denying his signature*, the judgment must be arrested, since a deed may be executed without actual signing, as where one person signs another's name by direction, and a sealing and delivery takes place by the party whose name is so written. Avera, 4 (Taylor's Term Rep.), 669.

CHARGE.—Where the perjury assigned consists in defendant's swearing on a trial for assault and battery on his wife that he had not beaten her on the day named in the warrant, and had not struck her but once in three years, and then for fun, and this is contradicted by proof that he did commit the assault on the day named in the warrant, and also assaulted her on other days, it is not error for the court to charge the jury "that the date in the warrant should be considered in connection

with the testimony of the witnesses for the state, and as to the various assaults mentioned in the testimony for the purpose of determining whether the assault was actually committed as charged in the warrant." Swaim, 97—462.

MATERIALITY.—On trial for assault with a deadly weapon the question as to whether such weapon was in fact used is material, but *how* it was used is immaterial, and an indictment for perjury for falsely swearing on a former trial for assault with a deadly weapon that such a weapon was used, need not state the particular manner in which the weapon was alleged to have been used. Murphy, 101—697.

Where the perjury consists in falsely swearing that a certain crop was reserved and excepted by parol in the sale of land, an exception that it could not be shown by parol that the crop was excepted; that such exception would be of no avail, and that the alleged false statement of defendant was, therefore, immaterial, can not be sustained. Growing crops are *fructus industriales*, and may be reserved by parol in the sale of land. Green, 100—419.

Where the witness testified on the trial of an indictment for larceny that an officer took from the possession of defendant therein certain marked coin by which the witness was enabled to identify them as his property, the testimony was material, and if false constituted the crime of perjury. Hare, 95—682.

Sec. 489. (1093). Perjury, subornation of. R. C., c. 34, s. 50. 1791, c. 338, s. 2.

If any person shall, by any means, procure another person to commit such wilful and corrupt perjury as is mentioned in the preceding section, the person so offending shall be punished in like manner as the person committing the perjury.

Sec. 490 (1185). Indictment for perjury; what to set forth. R. C., c. 35, s. 16. 1842, c. 49, s. 1.

In every indictment for wilful and corrupt perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom, the oath was taken (averring such court or person to have competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed.

Sec. 491 (1186). Indictment for subornation of perjury; what to set forth. R. C., c. 35, s. 17. 1842, c. 49, s. 2.

In every indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth

the bill, answer, information, indictment, declaration or any part of any record or proceedings, and without setting forth the commission or authority of the court or person before whom the perjury was committed or was agreed or promised to be committed.

Sec. 492 (2710). *Penalty for corruptly taking the oath prescribed for voters.* 1871-'2, c. 185, s. 31. 1876-'7, c. 275, s. 40.

Any person who shall corruptly take the oath prescribed for voters, shall be guilty of perjury, and be fined not less than five hundred dollars nor more than one thousand dollars, and be imprisoned at hard labor in the penitentiary not less than two nor more than five years.

Sec. 493 (2964). *Debtor swearing falsely; penalty.* R. C., c. 59, s. 25. §1793, c. 100, s. 10. 1868-'9, c. 162, s. 23.

If any insolvent or imprisoned debtor take any oath prescribed in this chapter falsely and corruptly, and upon indictment of perjury be convicted thereof, he shall suffer all the pains of perjury, and he shall never after have any of the benefits of this chapter, but may be sued and imprisoned as though he had never been discharged.

[The above statute refers to chapter 27, volume 2 of The Code, entitled "Insolvent Debtors."]

Sec. 494 (3235). *Perjury before courts-martial.* R. C., c. 70, s. 73. 1812, c. 828, s. 3.

If any person shall wilfully and corruptly swear falsely before any court-martial, touching and concerning any matter or thing cognizable before such court-martial, he shall be liable to the pains and penalties of perjury; and in all cases, to delinquents and witnesses, oaths shall be administered by the judge-advocate or presiding officer of said court-martial.

Where perjury is charged to have been committed in an oath taken before a company court-martial, it is not necessary to produce the commission of the captain, parol proof of his acting as such is sufficient. Gregory, 6 (2 Murph.), 69.

Sec. 495 (1092). *Perjury, its punishment.* R. C., c. 34, s. 49. 1791, c. 338, s. 1.

If any person shall wilfully and corruptly commit perjury on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the state, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of, or concerning any matter or thing, whereof such person is lawfully required to be sworn or affirmed, every

person so offending shall be guilty of a misdemeanor, and fined not exceeding one thousand dollars, and imprisoned in the county jail or penitentiary, not less than four months nor more than ten years.

PHARMACY.

Sec. 496 (3145). Misdemeanor to permit compounding of medicines by persons not registered, etc.; penalty. 1881, c. 355, s. 11. 1897, c. 182.

Any person who shall permit by wilful neglect the compounding and dispensing of prescriptions in his store or place of business by any person or persons not licensed, except under the supervision of a licensed pharmacist, or any person not registered who shall keep open shop for the retailing or dispensing of medicines or poisons, or who shall fraudulently represent himself to be licensed, or any licensed pharmacist or any dealer in medicines who shall fail to comply with this chapter, in relation to retailing and dispensing of poisons, shall for every such offence be guilty of a misdemeanor, and liable to a penalty not exceeding twenty-five dollars.

PHYSICIANS.

Sec. 497. Physicians, unlawful to disclose information from patients. 1885, c. 159.

No person duly authorized to practice physic or surgery shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: *Provided*, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

Sec. 498. Physicians required to register and obtain certificate. 1889, c. 181.

Any person who shall practice or attempt to practice medicine or surgery in this state without first having registered and obtained

the certificate as aforesaid shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned at the discretion of the court, for each and every offence: *Provided*, this act shall not apply to women pursuing the avocation of midwife, nor to reputable physicians or surgeons resident in a neighboring state coming into the state for consultation with a registered physician of this state.

Any clerk of the superior court who shall register or issue a certificate to any person in any other manner than that prescribed by this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred dollars and shall be removed from office.

[For requirements as to registration of physicians referred to in above section, see Laws 1889, c. 181.]

Sec. 499 (3132). Practicing without license. 1858-'9, c. 258, s. 15. 1885, ch. 117, 261. 1889, c. 181. 1891, c. 181.

Any person who shall practice medicine or surgery without having first applied for and obtained license from the said board of examiners, shall not be entitled to sue for or recover before any court any medical bill for services rendered in the practice of medicine or surgery or any of the branches thereof: *Provided*, that this section shall not apply to physicians who have a diploma from a regular medical college and were practicing medicine and surgery in this state prior to the seventh day of March, one thousand eight hundred and eighty-five. And any person who shall begin the practice of medicine or surgery in this state for a fee or reward, after the passage of this act, without first having obtained license from said board of examiners, shall not only not be entitled to sue for or recover before any court any medical bill for services rendered in the practice of medicine or surgery, or any of the branches thereof, but shall also be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned at the discretion of the court, for each and every offence. *Provided*, that this act shall not be construed to apply to women who pursue the avocation of a midwife: *And provided further*, that this act shall not apply to any reputable physician or surgeon resident in a neighboring state coming into this state for consultation with a registered physician resident therein. But this proviso shall not apply to physicians resident in a neighboring state regularly practicing in this state.

EVIDENCE.—It is sufficient to prove that defendant held himself out to the public as a physician or surgeon, and invited or solicited professional employment from any who might desire his services. Van Doran, 109—.

STATUTE CONSTITUTIONAL.—This statute is not unconstitutional, as granting to physicians and surgeons of other states privileges that are not granted to citizens of this state, in violation of Const. N. C., art. 1, sec. 7, providing that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." The proviso as to non-resident physicians is merely an exception to a restrictive or prohibitory statute, inserted through courtesy to sister states upon the assumption that they have made ample provision for the health of their citizens by similar legislation. Van Doran, 109—.

This statute does not violate the fourteenth amendment of the constitution of the United States prohibiting any state from denying to any person the equal protection of the laws, since such amendment does not restrict the powers of the state when the statute applies equally to all persons in the same class, and the state is usually the judge of the classification. Call, 121—643.

The fact that the statute exempts from its requirements physicians already practicing in the state at the date of its passage does not make the statute invalid as creating a monopoly or conferring special privileges, since it is only the exercise of the police power to protect the public from imposters and incompetents. Call, 121—643.

The legislature has an unquestioned right to require an examination and certificate as to the competency of persons desiring to practice medicine or to exercise other callings affecting the public and requiring skill and proficiency. Call, 121—643.

INDICTMENT.—An indictment using the disjunctive "or" by charging that defendant "did practice or attempt to practice medicine or surgery," is sufficient. Shepherd, J., *dissenting*. Van Doran, 109—.

It is not necessary that the indictment should state that the defendant ever prescribed for or practiced upon a particular patient. Van Doran, 109—.

If indicted under section 5, chapter 181, laws of 1889, it is not necessary to allege that the defendant practiced for fee or reward, but if the indictment is under section 2, chapter 117, laws 1885, such allegation is necessary. Call, 121—643.

An indictment which does not charge that defendant did not register and obtain a certificate is defective. Call, 121—643.

The indictment need not charge that the defendant does not belong to one of certain classes which are withdrawn from the operation of the statute by a proviso. Call, 121—643.

NO CONFLICT.—Section 5, of chapter 181, laws of 1889, is not in conflict with and does not repeal section 2 of chapter 117, laws of 1885. Call, 121—643.

GIVING ONLY PROPRIETARY MEDICINE.—One who holds himself out to the public as a physician, visits patients and diagnoses their diseases, and agrees upon a fee for his services, can not evade the law by proving that the medicine administered was a proprietary remedy prepared and sold by himself. Van Doran, 109—.

SPECIAL VERDICT.—A special verdict which does not find that defendant practiced "for fee or reward" will not justify a conviction. Call, 121—643.

POISON.

INDICTMENT.—An indictment for administering poison (strychnia) with intent to kill, which does not aver that defendant "well knew that said strychnia was a deadly poison," is fatally defective. *Yarborough*, 77—524.

ATTEMPT.—An attempt to procure the miscarriage of a pregnant woman by administering a poisonous drug, is a misdemeanor at common law. *Slagle*, 82—653.

ARREST OF JUDGMENT.—Defendant was convicted in the inferior court upon an indictment marked "a true bill;" but before judgment she moved, on affidavits of the foreman of the grand jury, that no such bill had been acted on by the grand jury or returned by them, to correct the record so as to show that no indictment had, in fact, been found. The court denied the motion because not made in apt time; defendant then moved to arrest the judgment which was also denied, and judgment being pronounced, she appealed to the superior court, which arrested judgment: *Held*, that while the inferior court properly refused to arrest the judgment, it erred in not entertaining the motion to amend. The superior court erred in arresting the judgment; it should have reversed the judgment of the inferior court in denying the motion to amend, and remanded the case. *Harrison*, 104—728.

Sec. 500 (1094). Poison, unlawful to put in streams, for purpose of catching, killing or driving away fish. 1883, c. 290.

It shall be unlawful for any person to put any poisonous substance for the purpose of catching, killing or driving off any fish in any of the waters of a creek or river, and any person violating this section shall be guilty of a misdemeanor.

Sec. 501. Poison, maliciously or secretly administering. 1887, c. 32.

If any person, by maliciously administering poison to another, or by laying or placing poison for another in any food or drink, or otherwise, with intent to kill or injure such other person, or shall cause any person to partake of the same, though death do not ensue therefrom, the person so offending shall be guilty of a felony and punished as is prescribed in the next preceding section; and if any person, by offering to administer poison, or by laying or placing the same for another, shall wilfully attempt to commit the said felony without consummating the same, he shall be guilty of a misdemeanor and punished by imprisonment in jail or the penitentiary not less than two months nor more than two years, or by a fine not exceeding two hundred dollars, or both, in the discretion of the court.

Sec. 502. Poisonous shrubs or plants, unlawful to leave exposed in street. 1887, c. 338.

It shall be unlawful for any person to throw into or leave exposed in any public square, street, lane, alley, or open lot in

any city, town or village, or in any public road in this state, any mock orange or other poisonous shrub, plant, tree or vegetable.

Any person violating the provisions of this act shall be liable in damages to any person injured thereby, and shall also be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned at the discretion of the court.

Sec. 503. Death by poison, analysis by state chemist. 1885, c. 355. 1887, c. 269.

When at any coroner's inquest held over the body of any person it shall be ascertained by the coroner and his jury that the deceased may have come to his or her death by some poison, hurtful chemical or other substance, administered by some person other than the deceased, then it shall be the duty of the coroner to summon two physicians, who must have been licensed to practice under the laws of North Carolina, and shall have them make in his presence a thorough examination of the body of the deceased, externally and internally, making a *post-mortem* examination of such of the vital parts as the heart, brain, stomach, liver, smaller intestines, et cetera, as the said coroner and physicians may deem necessary, and of all clothing, bedclothing, drugs, discharges, articles of food, utensils, furniture and all other articles which may have been used or have in any way been connected with the case. The said coroner and physicians shall make their report in writing to the coroner's jury, stating whether or not in their opinion the deceased came to his or her death by a poison, hurtful chemical or other substance at the hands of some other person than the deceased; and whenever in the opinion of the said coroner and physicians it is still necessary in order to reach the ends of justice that a chemical analysis of the *viscera* be made, they shall remove the stomach or other parts as they may deem necessary, and shall secure any drugs, food or other articles as aforesaid and shall pack each soft or liquid substance in a separate air-tight vessel and shall seal the same, all three of them being present, and deliver them to the coroner, who shall transmit them himself or by a trustworthy messenger to the chairman of the board of county commissioners, with full reports of their proceedings and conclusions. Whenever a chemical analysis of the articles shall be found necessary as aforesaid, the chairman of the board of the county commissioners shall forward by a trustworthy messenger the article or articles taken and sealed as aforesaid and delivered to him by the coroner to the [state] chemist provided in this act, with a certified copy of the report of the coroner and physicians and the coroner's jury as

aforesaid, and his certificate that the requirements of this act have been complied with. All expenses in connection with the requirements of this section shall be borne by the county in which the deed was committed.

PRACTICE.

See TRIAL—APPEAL, ETC.

PRESENTMENT.

Sec. 504 (1166). Names of witnesses and grand jurors to be indorsed on presentment. R. C., c. 35, s. 7. 1797, c. 474, s. 2.

When a presentment shall be made of any offence by a grand jury, upon the knowledge of any of their body, or upon the testimony of witnesses, the names of such grand jurors and witnesses shall be indorsed thereon.

INDICTMENT MUST BE BY GRAND JURY QUALIFIED TO SERVE.—Every defendant has the right before he is put to answer a charge of the state against him, to require that the accusation should be preferred by a bill of indictment found by a grand jury composed of men *qualified to serve as prescribed by law*, and he may avail himself of the disqualification of any of them when or before he is called on to plead. Watson, 86—624.

HOW AND WHEN DEFENDANT MAY TAKE ADVANTAGE OF DEFECT IN GRAND JURY.—A defendant, in order to take advantage of the incompetency of the grand jury, must put in his plea in abatement in *apt time*, and by apt time is meant the arraignment of the defendant. Watson, 86—624.

If any of the grand jurors who found the bill were incompetent to serve, the defendant may take advantage of such fact, either by plea in abatement, or by motion to quash, but this must be done before the plea of not guilty is entered. Baldwin, 80—390.

Sec. 505 (1175). No person to be arrested on a presentment, nor tried, except on indictment. R. C., c. 35, s. 6. 1797, c. 474, s. 3. 1879, c. 12.

No person shall be arrested on a presentment of the grand jury, or put on trial before any court, but on indictment found by the grand jury.

BILL OF INDICTMENT NOT NECESSARY ON APPEAL FROM A JUSTICE'S COURT.—On appeal from the judgment of a justice of the peace, in a case where the justice has jurisdiction, the defendant may be tried on the original warrant without the finding of a bill of indictment by the grand jury.

since justices of the peace are given jurisdiction of certain offences, and defendants deprived of the constitutional right of trial by jury in such cases by the constitution itself (Const. N. C., art. 4, sec. 27), and the statute prescribing that on appeal from a justice of the peace the trial should be *de novo* in the superior court does not mean that the complaint, warrant and arrest preliminary to the trial before the justice shall all go for nothing, and that in the superior court there shall be a new complaint and a new arrest as well as a new *trial*. Quick, 72—241.

PRESENTMENT NEED NOT BE SIGNED.—A presentment need not be signed by anyone; it is the returning of the indictment in open court and its being there recorded that make it effectual. Cox, 28 (6 Jones), 440.

PRISON BOUNDS.

Sec. 506 (3466). Prison bounds for health of prisoners laid out by county commissioners; bond to keep bounds. R. C., c. 87, s. 11. 1741, c. 33, s. 3.

For the preservation of the health of such persons as shall be committed to jail, the board of commissioners of each county shall mark out such a parcel of the land as they shall think fit, not exceeding six acres, adjoining the prison, for the rules thereof; and every prisoner not committed for treason or felony, giving bond with good security to the sheriff of the county to keep the rules, shall have liberty to walk therein, out of the prison, for the preservation of his health; and on keeping continually within the said rules, shall be deemed to be in law a true prisoner and that every person may know the true bounds of said rules, shall be recorded in the county records, and the marks thereof shall be renewed as occasion may require.

PRIVILEGE MUST BE ORDERED.—A prisoner is entitled to the privilege of the prison bounds only by an express order or rule of the court which sentences him. *Ex parte Bradley*, 26 (4 Ired.), 543.

FARMING OUT.—Only the judge who tries a case can authorize a person convicted to be farmed out. Pearson, 100—414.

CONVICTED PERSONS NOT ENTITLED TO PRISON BOUNDS.—Prison bounds can not be allowed to persons who have been *convicted* of criminal offences and imprisoned by judgment of the court. The words "committed to jail" are used in their technical sense, and imply that the prisoner is sent to jail to be detained and held to answer for a criminal offence preferred or to be preferred. Pearson, 100—414.

DIFFERENCE BETWEEN BEING COMMITTED TO JAIL AND SENTENCED TO JAIL AS A PUNISHMENT.—The word *committed* has a technical sense in criminal procedure, and is so used in the above statute. A person is *committed* to jail to answer for a criminal offence; upon conviction he is *sentenced* to jail as a punishment. Pearson, 100—414.

PRESUMPTIONS.

WHEN A CRIMINAL INTENT IS CONCLUSIVELY PRESUMED, AND WHEN NOT.—Where an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offence, and no one who violates the law, which he is conclusively presumed to know, can be heard to say that he had no criminal intent in doing the forbidden act; but where the acts are themselves equivocal and become criminal only *by reason of the intent with which they are done*, both must unite to constitute the offence, and both facts must be proved in order to a conviction. King, 86—603.

POSSESSION OF FORGED ORDER FOR GOODS.—The possession by a defendant of a forged order for goods drawn in his favor, and his obtaining the goods thereon, constitute complete proof that the defendant either forged the order himself or assented to the forgery, and the fact that he could not write does not rebut the legal presumption of his guilt. Lane, 80—407. Britt, 14 (3 Dev.), 122.

POSSESSION OF PISTOL PRESUMPTION OF GUILT.—Where one carries a pistol concealed about his person off his own premises, the law presumes the criminal intent from the possession, and the burden is on the defendant to rebut this presumption by testimony sufficient to satisfy the jury of his innocent purpose. McManus, 89—555.

CLERK FAILING TO PAY OVER LICENSE TAX.—Where a clerk of the superior court is indicted for failure to pay over a license tax, and the failure to pay is admitted, the law raises a presumption that such failure was wilful, and it is incumbent on the defendant to rebut the presumption. Heaton, 77—505.

DISTANCE OF COURT-HOUSE FROM COUNTY LINE.—The law raises no presumption, nor does the court judicially know, that the court-house of a county is five miles or more from the boundaries of such county; and so where a defendant, on his arrest, said that he desired to be carried to the court-house which was within five miles of the place where the offence was committed, and on being carried there did not object that it was not the proper court-house, it was error in the trial judge to leave these circumstances to the jury upon the question of *venue*. He should have instructed them that there was no evidence that the offence was committed in the county as charged. Revels, 44 (Busb.), 200.

CONFESSIONS—INFLUENCE PRESUMED TO CONTINUE.—Where a prisoner has once been induced to confess through hope or fear, confessions subsequently made are presumed to proceed from the same influence until the contrary be shown by clear proof. Roberts, 14 (3 Dev.), 259.

UNLAWFUL ACTS OF PUBLIC OFFICERS PRESUMED TO BE CRIMINAL.—The law presumes every act in itself unlawful to have been criminally intended until the contrary appears; therefore where a public officer is indicted for failure to perform a duty required by law, the law raises a presumption that such failure is *wilful*, and makes it incumbent on him to rebut the presumption. Heaton, 77—505.

BURGLARY—NO PRESUMPTION THAT THE BREAKING WAS IN THE NIGHT.—There is no presumption of law arising from any fact that a felonious breaking into a dwelling-house was committed in the night-time rather than in the day, and before a defendant can be convicted of burglary that fact must be proved, either directly or indirectly. Whit, 49 (4 Jones), 349.

KILLING WITH A DEADLY WEAPON PRESUMED TO BE MURDER.—Where the intentional killing with a deadly weapon is established by the proof, the killing is presumed to be malicious, and, of course, amounting to murder,

until the contrary appears from circumstances of alleviation, excuse or justification; and it is incumbent upon the prisoner to make out such circumstances to the *satisfaction* of the jury, unless they arise out of the evidence against him. Brittain, 89—481.

BURDEN OF SHOWING MATTER OF MITIGATION.—The fact of killing with a deadly weapon being admitted, or proved, the burden of showing any matter of mitigation, excuse or justification is thrown upon the prisoner, and it is incumbent on him to establish such matter, neither beyond a reasonable doubt nor according to a preponderance of the testimony, but to the satisfaction of the jury. Willis, 63—26.

ESCAPE—WHEN BURDEN ON DEFENDANT.—On indictment of an officer for permitting an escape, after proof that the prisoner was committed to the custody of the defendant and afterwards escaped, the law presumes negligence, and the burden is on the defendant to show that there was no negligence on his part, and that he used all legal means for the safe-keeping of the prisoner. Hunter, 94—829.

BURDEN OF PROOF AS TO MARRIAGE.—On indictment for fornication and adultery, it is not necessary for the state to prove that defendants are not married, since the question whether they are married or not is a matter peculiarly within their knowledge, and the burden is on them to show a marriage, if such exists. McDuffie, 107—885.

OPINION OF COURT PRESUMED TO HAVE BEEN AT PROPER TIME.—Where the record recites that a regular term of the superior court was opened and held on *Wednesday*, instead of Monday of the week fixed by statute, it will be presumed that the sheriff duly opened the court and adjourned it from day to day, as provided by The Code, sec. 926. Weaver, 104—758.

INDICTMENT PRESUMED TO BE RETURNED IN OPEN COURT, WHEN.—The recital in an indictment that “the jurors upon their oath present,” etc., raises a presumption, when accompanied by the endorsement of “a true bill” signed by the foreman, that it was duly returned and presented in open court. Weaver, 104—758.

WHEN PRESUMPTION OF AN ACQUITTAL ARISES.—Where a party is placed on trial for an alleged offence, but the record does not disclose the result, the presumption is that he was acquitted; so where the record states that he was “released” it will be taken as implying, nothing appearing to the contrary, that he was acquitted. Bowers, 94—910.

ACQUISITION OF EASEMENT.—An easement in land may be presumed from long, continuous and uninterrupted enjoyment, and its abandonment may be presumed from *non-user* and obstructions acquiesced in and submitted to without resistance for a period sufficient to raise such presumption. This applies to public as well as private easements. Long, 94—896.

PRESUMPTION MAY BE REBUTTED.—There is a presumption of law that one intends the natural consequences of his act, but this establishes only a *prima facie* case against the accused, and throws the burden on him to rebut the presumption. Phifer, 90—721.

PRIZE FIGHTING.

Sec. 507. Unlawful to engage in prize fighting, etc.; duty of governor. 1895, c. 28.

SECTION 1. It shall be unlawful for any two or more persons to engage in a prize fight, or sparring match, or glove or fist contest, for money or other valuable prize or stake.

SEC. 2. It shall be unlawful for any one to bet or lay a wager on the result of any prize fight, sparring match, or glove or fist contest.

SEC. 3. It shall be unlawful for any one to advise, aid or abet in any way whatever, in promoting any prize fight, sparring match, or glove or fist contest, for money or other valuable prize or stake. All persons offending against sections two and three shall be equally guilty as those offending against section one.

SEC. 4. Anyone violating this act shall be fined not less than five hundred dollars (\$500), or imprisoned in the penitentiary or jail for not less than one year nor more than five years. The court shall have the discretion to fine alone or to fine and imprison the offender against this law.

SEC. 5. That it shall be the duty of the governor, if he be apprised by affidavits of two responsible citizens of the state, that there is imminent danger that this statute is about to be violated, to use, as far as necessary, the civil and military power of the state to prevent it, and to have the offenders arrested and bound to keep the peace.

PROCEDENDO.

Where, upon appeal to a higher court, it appears that the proceedings and judgment under which a prisoner charged with an offence was arrested or sentenced in a justice's court are void for irregularity, the prisoner should not be allowed to escape, but a *procedendo* should issue to the justice to the end that the charge may again be lawfully inquired into. Ivie, 118—1227.

Where an inferior court, having jurisdiction of a case, transfers it improperly for trial to a higher court, which could take cognizance of it only on appeal, it is proper to issue a *procedendo* to the lower court. Sykes, 104—700.

If a justice of the peace assumes jurisdiction of an offence cognizable only in the superior court, and pronounces judgment and refuses the defendant an appeal, the superior court will, on petition of the defendant, issue a *procedendo* to compel the justice to send up the case and restore the defendant any fine and costs he has paid, and grant him bail for his appearance in the superior court. Sykes, 104—700.

PROFANE SWEARING.

See NUISANCE.

PROVISIONS.

See UNWHOLESOME FOOD—ADULTERATION OF FOOD.

PUBLIC ARMS.

Sec. 508 (3556). Selling, buying and embezzling public arms; misdemeanor. R. C., c. 89, s. 8. 1831, c. 45, s. 5.

If any person to whom shall be confided public arms or accoutrements, shall sell, or in any manner embezzle the same, or any part thereof, or if any person shall purchase any of them, knowing them to be such, the person so offending shall be guilty of a misdemeanor.

Sec. 509 (3558). Officers to demand public arms of persons not entitled. R. C., c. 89, s. 10. 1831, c. 45, s. 7.

Every commissioned officer of the militia, whenever and wherever he shall see or learn that any of the arms belonging to the state are in the possession of any person other than in whose hands they may be placed for safe-keeping, under the provisions of this chapter, shall make immediate demand for the same personally or in writing; and should such person refuse to deliver them to the officer, he shall be guilty in like manner, and punished in like manner, as for selling or embezzling public arms.

PUNISHMENT.

Sec. 510 (1096). Punishments for felonies not specified. R. C., c. 34, s. 27.

Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute, shall be imprisoned in the county jail or penitentiary not exceeding two years, and be fined, in the discretion of the court, or if the offence be infamous, the person offending shall be imprisoned in the county jail or penitentiary, not less than four months nor more than ten years, and be fined.

Sec. 511 (1097). Punishments for misdemeanors not specified. R. C., c. 34, s. 120.

Offences made misdemeanors by statute, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offence be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or penitentiary not less than four months or more than ten years, and be fined.

STATUTE PROHIBITING A MATTER OF PUBLIC GRIEVANCE.—If a statute prohibit a matter of public grievance, or command a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specifies no other mode of proceeding, notwithstanding no punishment is prescribed in the act. Parker, 91—650. Bloodworth, 94—918.

WHEN STATUTE IMPOSES A PENALTY.—Where a statute makes an act unlawful and mentions a particular mode of proceeding, as when it imposes a penalty for its violation and says nothing more, that proceeding excludes that by indictment. Snuggs, 85—541.

FALSE PRETENCE A MISDEMEANOR.—The offence of obtaining goods by false pretence is a misdemeanor because it is not made a felony by the statute, and the punishment being prescribed in the statute, no other can be imposed. Crumpler, 90—701.

WHEN STATUTE MAKES AN ACT UNLAWFUL BUT PRESCRIBES NO PUNISHMENT.—Where a statute makes the commission of an act "unlawful" but specifies no mode of proceeding, a violation of its provisions is a misdemeanor punishable by indictment at common law. Parker, 91—650.

WHAT OFFENCES ARE PUNISHABLE BY IMPRISONMENT IN PENITENTIARY.—Only felonies where no specific punishment is prescribed, and offences that are infamous, or done in secrecy and malice, or with deceit and intent to defraud, can be punished by imprisonment in the penitentiary. Powell, 94—920.

SECRETLY REMOVING CROP BY TENANT.—The offence of removing crops without payment of rents or advancements, or without giving notice of such removal, although it may have been committed secretly, or at night, is a simple misdemeanor, and can not be punished by imprisonment in the penitentiary. Powell, 94—920.

WHEN PUNISHMENT IN THE DISCRETION OF THE JUDGE.—When the limit of punishment is not fixed by the legislature, it is left as a matter of discretion with the presiding judge, and the supreme court can neither control such discretion nor fix the limits of punishment. Miller, 94—904.

PUNISHMENT FOR SIMPLE ASSAULT ON INDICTMENT FOR ASSAULT WITH INTENT TO RAPE.—Where, on indictment for an assault with intent to commit rape, the conviction is for simple assault, and there is no evidence that the prosecutrix suffered any bodily pain, the punishment can not exceed a fine of \$50 or imprisonment for thirty days. Nash, 109—.

PREVIOUS OFFENCES—RECITAL OF.—It is not improper for the judge to recite in the judgment, as a reason for the severity of the sentence, the many offences of which the defendant has been previously convicted. Wilson, 121—650.

REMITTING FINES.—The practice of inflicting fines, with a provision that they should be diminished or remitted by matter thereafter to be done or shown to the court, is illegal. Bennett, 20 (4 D and B.), 43.

It is irregular to annex to the sentence any condition for its subsequent remission. Bennett, 20 (4 D and B), 43.

SUSPENDED JUDGMENT.—Where judgment is suspended against two on condition that one of them pay the entire costs of the prosecution, and such one pays only a part, the judge may impose the suspended sentence, though such defendant has already been committed to jail for default of the payment of costs. Crook, 115—760.

If the court couples with a judgment for the payment of costs any judgment that might constitute a part of a sentence the power of the court is exhausted in its rendition, and the suspension of judgment will be deemed to have been ordered on condition of the performance of such requirements. Crook, 115—760.

IMPROPER JUDGMENT—PRACTICE.—The fact that both fine and imprisonment were imposed when only one was authorized does not entitle a defendant to a new trial, but the case will be remanded for proper sentence. Crowell, 116—1052.

IMPRISONMENT WHILE AWAITING PUNISHMENT.—Where defendant is committed during the term for non-payment of costs and is brought before the judge during the same term for judgment, the imprisonment is no part of the punishment. Crook, 115—760.

Where the judgment is that the defendant pay a fine and stand committed until it be paid, the imprisonment is no part of the punishment. Crook, 115—760.

BANISHMENT—CONDITIONAL JUDGMENT.—Upon conviction defendants were adjudged to be imprisoned and pay the costs, but at the same time the court directed that if the defendants leave the state within thirty days no *capias* was to be issued; defendants did leave, but returned very soon, when they were arrested and imprisoned: *Held*, that while the court had no power to banish the defendants, the judgment in respect to the imprisonment and costs was valid, and could be enforced upon their return to the state, and that this was not a conditional judgment. Hatley, 110—522.

EFFECT OF SENTENCE TO PAY COSTS.—A sentence that the defendant shall pay the costs of the prosecution is as much a part of the punishment as a fine imposed. Manuel, 20 (4 D and B), 20.

PUNISHMENT ON APPEAL FROM JUSTICE.—A trial in the superior court on appeal from a justice being *de novo*, it is competent for the judge, in his discretion, to impose a heavier or lighter punishment than the justice, provided the punishment does not exceed the limit which the justice might have imposed. Stafford, 113—635.

ASSAULT AND ROBBERY.—A sentence of two years imprisonment and working on the roads is not "cruel and unusual" punishment for an unjustifiable and outrageous assault combined with robbery. Apple, 121—584.

PUNISHMENT OF ESCAPED PRISONER RECAPTURED.—If a prisoner under sentence of death is respited and escapes, and is not recaptured until after the day fixed for the execution, the judge may, at a subsequent term, direct the sentence to be carried into effect. Cardwell, 95—643.

PRACTICE WHEN ILLEGAL PUNISHMENT IS INFLICTED.—Where illegal punishment is inflicted and the case is brought to the supreme court for review, the case will be remanded to the superior court with an instruction to impose the punishment authorized by law. Lawrence, 81—522.

HUSBAND BEATING HIS WIFE.—Punishment by imprisonment in the county jail for two years imposed on a husband convicted of beating his wife, without excuse or provocation, to such a degree of cruelty as to indicate malice towards her, is not in violation of the constitution forbidding cruel and unusual punishment. Pettie, 80—367.

WHEN JUDGMENT MAY BE SUSPENDED.—In cases where the law gives to the judges a discretion over the quantum of punishment, they may with propriety suspend the sentence for the avowed purpose of affording to the convicted an opportunity to make restitution to the person peculiarly aggrieved by his offence, or to redress its mischievous public consequences. *Bennett*, 20 (4 D. and B.), 43.

PUNISHMENT MUST BE UNCONDITIONAL.—A judgment once rendered is the certain and final conclusion of the law following upon ascertained premises. It must, therefore, be unconditional, and no authority can remit or mitigate the punishment except by the exercise of the high powers of the executive. *Bennet*, 20 (4 D. and B.), 43.

THE DISJUNCTIVE "OR" NOT CONSTRUED TO MEAN "AND."—Where a statute provides that a party guilty of the offence created by it shall be fined or imprisoned, the court has no power to both fine and imprison. *Walters*, 97—489.

UNEXECUTED JUDGMENT MAY BE MODIFIED DURING TERM.—The court has power during the term to correct or modify an unexecuted judgment in criminal as well as in civil actions. *Mitchell*, 95—661.

FORNICATION AND ADULTERY.—Persons convicted of fornication and adultery may be imprisoned in the county jail. *Manly*, 95—661.

PUNISHMENT OF ONE THOUGH OTHERS NOT TAKEN.—Where, on indictment for a riot, one of several defendants is convicted, he may be punished though the others are not yet taken, for though the others may be acquitted, yet he is estopped by the verdict to deny his guilt. *Pugh*, 3 (2 Hay.), 55 (218).

CONSPIRACY TO CHARGE WITH INFANTICIDE.—A person convicted of a conspiracy to charge another with infanticide can not be punished by imprisonment in the penitentiary, since such offence is only a misdemeanor. *Jackson*, 82—565.

PRACTICE WHERE IMPROPER JUDGMENT IS PRONOUNCED.—Where the court erroneously sentences one convicted of a crime to pay a fine, and on default thereof to be imprisoned, the judgment is void as being alternative and conditional, and the rule in such cases is to remand the case that a proper judgment may be pronounced. *Perkins*, 82—681.

PUNISHMENT FOR RECEIVING STOLEN GOODS.—A defendant convicted of receiving stolen goods, knowing them to have been stolen, may be punished by imprisonment in the penitentiary, notwithstanding such offence is made only a misdemeanor by The Code, sec. 1074, since the statute also prescribes that, on conviction, "such receiver shall be punished as one convicted of larceny." *Brite*, 73—26.

ASSAULT AND BATTERY.—A sentence of five years' imprisonment in the county jail and a recognizance of \$500 to keep the peace for five years after the expiration of that time, imposed upon a defendant convicted of assault and battery, is a "cruel or unusual punishment," within the prohibition contained in Const. N. C., art. 1, sec. 14, providing that "excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." *Driver*, 78—423.

SAME ACT WHICH CONSTITUTES A CONTEMPT ALSO A VIOLATION OF LAW.—Where the same act which constitutes a contempt of court is also a violation of the criminal law, the perpetrator may be convicted and punished for the violation of law, notwithstanding he has already been punished for the contempt. *In re Griffin*, 98—225.

WHEN PUNISHMENT INCREASED BY STATUTE.—Where the punishment has been increased by statute, and the indictment concludes as at common law, the court can only impose such sentence as would have been lawful before the statute. *Lawrence*, 81—522.

DEFENDANT ILLEGALLY IMPRISONED NOT ENTITLED TO BE DISCHARGED.—Where a person has been illegally imprisoned in the penitentiary, he is entitled to a *certiorari* to review the judgment, but such *certiorari* does not entitle him to his discharge on the ground that its effect is to give him a new trial and that he has already been once in jeopardy, but the ease will be remanded for proper judgment. Lawrence, 81—522.

DISQUALIFICATION FOR OFFICE AND SUFFRAGE OF PERSONS CONVICTED OF INFAMOUS CRIMES.—The loss of the right of suffrage and disqualification for office, imposed by article six of the constitution upon persons convicted of infamous crimes, constitute no part of the punishment of the court, but are the mere consequence of such judgment. Jones, 82—685.

CHANGE OF PUNISHMENT FOR LARCENY FROM WHIPPING TO IMPRISONMENT NOT AN EX POST FACTO LAW.—The statute changing the punishment for larceny from whipping and imprisonment at common law to imprisonment in the penitentiary is not subject to the objection of being an *ex post facto* law. The rule is, not that the punishment can not be *changed*, but that it can not be *aggravated*, and therefore a defendant convicted of larceny just before the ratification of the statute can not object to being imprisoned in the penitentiary. Kent, 65—311.

HOW DEFENDANT IMPROPERLY IMPRISONED IN PENITENTIARY RELEASED.—A defendant improperly sentenced to imprisonment in the penitentiary for assault and battery can not be released by *habeas corpus*, where he fails to appeal from such judgment, since the writ of *habeas corpus* is denied to persons detained by the final judgment of a court of competent jurisdiction, but his remedy is by writ of *certiorari*. *In re Schenck*, 74—607.

Sec. 512 (749). Confession of judgment to secure fine and costs not to operate as a discharge of original judgment. 1879, c. 264, s. 6. 1885, c. 364.

In cases where the court permits a defendant convicted of any criminal offence, to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid. This section shall be applicable to the courts of justices of the peace, mayors, and other chief officers of cities and towns.

Sec. 513 (750). Defendant failing to pay fine and costs may again be arrested. 1879, c. 264, s. 7. 1885, c. 364.

In default of payment of such fine and costs, it shall be the duty of the court at any subsequent term thereof on motion of the solicitor of the state to order a *capias* to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law. This section shall be applicable to the courts of justices of the peace, mayors and other chief officers of cities and towns.

WHEN CONFESSION OF JUDGMENT DISCHARGES THE ORIGINAL JUDGMENT.—Where, on conviction for an assault, the defendant is ordered into custody "*until the fine and costs are secured*," and he then confesses judgment,

with sureties to secure the fine and costs imposed, and execution is afterwards issued and returned unsatisfied, a motion to order the defendant again into custody until the fine and costs are paid can not be sustained, since the confession of judgment with sureties, and his discharge consequent thereon, operate as a discharge of the original judgment imposing the fine and costs. Cooley, 80—398.

NOTE.—The above decision was made before the two preceding statutes were passed.

JUDGMENT MAY BE CONFESSED TO THE STATE.—Where a defendant is ordered into custody until a fine and costs are paid, it is competent for him to confess judgment to the state with sureties for the fine and costs, to be taxed by the clerk. Love, 23 (1 Ired.), 264.

MOTION TO SET ASIDE A JUDGMENT CONFESSED.—Where a surety confesses judgment to the state for a fine and costs imposed on a defendant, a motion by such surety, at next term of the court, to set aside the judgment on the ground that he was informed by the officers of the court that the costs would be but a certain sum, when in truth the costs were a much larger sum, must be denied when there is no evidence that the declaration of the officers was made with an intent to defraud the surety, or that he would not have confessed the judgment if he had known the costs amounted to the larger sum. Love, 23 (1 Ired.), 264.

AN ESCAPE WITHOUT THE SANCTION OF THE COURT DOES NOT DISCHARGE THE JUDGMENT.—Where a defendant is ordered into custody until he shall pay the fine and costs imposed by the judgment against him, and is permitted by the sheriff to escape without the authority or consent of the solicitor, the judgment is not discharged, and the defendant may be put in custody again. Simpson, 46 (1 Jones), 80.

DEFENDANT AGREEING TO PAY IN TEN DAYS.—A magistrate's judgment imposing a fine and costs is not discharged by the fact that defendant was permitted to go at liberty on his agreement to pay in ten days, and on his failure to perform his agreement he may be arrested for the fine and costs. Dula, 100—423.

JUDGMENT PRONOUNCED AT SUCCEEDING TERM WHERE DEFENDANT ESCAPES AFTER VERDICT.—Where a defendant, on the rendition of a verdict against him, fails to appear that sentence may be imposed, and the case is continued until next term, the court may pronounce judgment at the succeeding term. Black, 94—809.

APPEAL NOT FORFEITED BY FAILURE TO APPEAR ON RENDITION OF VERDICT.—Where a defendant fails to appear to receive the sentence of the court after the rendition of a verdict against him, and the case is continued, he may appeal from the judgment pronounced against him at a succeeding term. His right of appeal is not forfeited by his failure to appear at the trial term after verdict rendered against him. Black, 94—809.

SPECIAL VERDICT MUST FIND EVERY ELEMENT OF THE OFFENCE.—Where a special verdict is rendered, all the facts necessary to constitute the offence charged must be specifically ascertained, otherwise no judgment can be pronounced. Bloodworth, 94—918.

Sec. 514. Convicts to be sentenced to hard labor on public roads in certain cases; expenses, how paid, etc. 1887, c. 355.

(1) When any county has made provision for the working of convicts upon the public roads, or when any number of counties have jointly made provision for working convicts upon the public roads, it shall be lawful for, and the duty of the judge holding

court in such counties, to sentence to imprisonment and hard labor on the public roads for such terms as are now prescribed by law for their imprisonment in the county jails or in the state prison, the following classes of convicts: first, all persons convicted of offences the punishment whereof would otherwise be wholly, or in part, imprisonment in the county jail; second, all persons convicted of crimes the punishment whereof would otherwise wholly or in part be imprisonment in the penitentiary for a term not exceeding ten years. In such counties there may also be worked on the public roads, in like manner, all persons sentenced to imprisonment in jail by any magistrate, and also all insolvents who shall be imprisoned by any court in said counties for non-payment of costs in criminal causes may be retained in imprisonment and worked on the public roads until they shall have repaid the county to the extent of the half fees charged up against the county for each person taking the insolvent oath. The rate of compensation to be allowed each insolvent for work on the public roads shall be fixed by the county commissioners at a just and fair compensation, regard being had to the amount of work of which each insolvent is capable.

(2) That the convicts sentenced to hard labor upon the public roads, under provisions of section one of this act, shall be under the control of the county authorities, and said county authorities shall have power to enact all needful rules and regulations for the successful working of all convicts upon said public roads: *Provided*, the county commissioners shall have power to work such convicts on the public roads or canalizing the main drains and swamps.

(3) That nothing contained in this act shall in anyway affect, interfere with, or diminish any convicts granted or assigned to any railroad, or other work of internal improvement, either by contract executed prior to this act, or granted or assigned by any prior act of this general assembly.

(4) That in all cases where the judge presiding shall be satisfied that there is good reason to fear that an attempt to release or to injure any person convicted of any of the offences mentioned in section one of this act, class second, it shall be lawful for the judge to sentence such convicts to imprisonment in the penitentiary, as is now provided by law: *Provided*, that no person who has been convicted and sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson, shall be assigned under this act.

(5) That in addition to the convicts mentioned in section one of this act, the board of directors of the penitentiary is authorized and directed to furnish to the authorities of any county within the state, convicts not exceeding twelve in number during any one year for the purpose of working the public roads in said county. The said convicts shall be at all times under the supervision and control as to their government and discipline of the penitentiary board as in case of hiring convicts to railroad companies. Any county applying for convicts under this act shall erect suitable stockades for their safe-keeping and protection, and shall pay the expense of their transportation from and to the penitentiary.

(6) That the board of county commissioners of the several counties of the state taking advantage of this act shall levy a special tax as other taxes are levied for the purpose of paying the expenses of said convicts, building of stockades, etc., and the expenses shall be paid by the counties taking advantage of this act.

PUNISHMENT CAN NOT BE CHANGED BY COUNTY COMMISSIONERS.—The court has no power to imprison a convict elsewhere than in the county jail, nor can it delegate to the county commissioners power to change the punishment imposed by the court to imprisonment in the workhouse of the county. Norwood, 93—578.

DEFENDANT NOT REQUIRED TO WORK OUT COSTS AFTER HIS TERM OF IMPRISONMENT EXPIRES.—Where the court sentences a defendant to a term of imprisonment, it can not also adjudge that he be confined in the county workhouse after the term of imprisonment expires until he pay the costs of the trial. Norwood, 93—578.

CONSTITUTION.—Code, sections 3433 and 3448 authorizing the working of persons convicted of criminal offences on the public roads is constitutional. Weathers, 98—685.

HOW CONVICTS HIRED OUT.—Code of N. C., sec. 3448, only applies to farming out convict labor to individuals and corporations, and does not extend to cases of convicts employed on public works under the control of public agents, so where a prisoner was worked by the county authorities on the public roads, the person in charge of him was guilty of an escape for negligently permitting such prisoner to escape. Sneed, 94—806.

The court can not *order* or *direct* that defendant be hired out, but may *authorize* the county commissioners to do so under the rules and regulations prescribed by them. Johnson, 94—863.

The commissioners have authority to provide for the working upon the public roads any one legally convicted of any crime or misdemeanor, or upon failure of one to enter into bond to keep the peace or for good behavior, or to pay or properly secure the payment of costs or fine. Yandle, 119—874.

The order of the commissioners directing the employment of a convict on the public roads, and committing him to the custody of a superintendent of such works, is not an additional sentence or judgment pronounced by the commissioners, but an incident to the sentence imposed by the court in contemplation of which the prisoner committed the offence. Yandle, 119—874.

QUARANTINE.

Sec. 515 (2893). Quarantine, when and by whom directed; masters and pilots to report the health of vessels; duty of those ordered to perform quarantine; penalties on masters and pilots. R. C., c. 94, s. 1. 1783, c. 194, s. 12. 1793, c. 379, s. 1. 1802, c. 624.

The commissioners of navigation in the respective ports and inlets of the state, and where there are no such commissioners, any three justices of the peace convenient to said ports or inlets, or the commissioners of any seaport town, shall meet together and appoint such place or places, as they may think proper, for vessels to perform quarantine; and when a vessel shall arrive at any of the said ports or inlets, having an infectious distemper on board, or which came from any place that was at the time of her sailing, or shortly before, infected with any malignant disorder, the master and pilot of the vessel shall anchor her at the place so appointed, and give immediate information thereof to the commissioners of navigation, or to the commissioners of the seaport town; or, where there are no commissioners, to the nearest justices of the peace, who, with two others to be summoned by him, or any three of the commissioners aforesaid, or any one commissioner and two justices, or any one justice and two commissioners, shall thereupon cause such vessel and her crew to be examined by at least one experienced physician, when to be had; upon whose report in writing (which said physician is required to make), and on other information they may receive, any three of such commissioners, and where there are no commissioners, any three neighboring justices, or any one commissioner and two justices, or any one justice and two commissioners, or the commissioners of the town to which such vessel is bound, may order and command the master of the vessel, crew and passengers to perform quarantine, as by them shall be deemed most proper and requisite, to check or prevent any infectious distemper from spreading in the state; and every person on board such vessel directed to perform quarantine, shall, from time to time, during such quarantine, obey all orders given by the authority of said commissioners or justices, respecting the victualling, purifying and cleansing of such vessel, and all persons and articles on board, and the intercourse of said persons with the inhabitants of the state; the receiving any persons on board, or the putting them on shore; and if the pilot or master neglect to give such information as above required, the pilot, for such neglect, shall forfeit and pay one hundred dollars, and the master, for the like neglect, shall

forfeit and pay two hundred dollars. And in case the master of any vessel, so ordered to perform quarantine, shall refuse to comply with, or fail to fulfill the orders, for performing quarantine with his vessel as aforesaid, he shall forfeit and pay two hundred dollars for each day he shall fail to perform the quarantine; for which forfeiture the property of the captain, with the vessel and cargo, shall be liable, if it shall appear that the breach of the order was by the consent of the owner or consignee; but if the owner or consignee did not consent, then the master of such vessel only shall be liable.

Sec. 516 (2894). Vessels coming from infected place to anchor at quarantine ground; coming into port without permission, master or pilot indictable. R. C., c. 94, s. 2. 1817, c. 946, s. 1.

If any vessel shall be brought into the state from a place which at the time of her departure was infected with the yellow fever, smallpox, or other infectious disorder; or if any vessel, arriving in the state, shall have the smallpox or yellow fever or other infectious disorder on board, or shall have had such disorder on board, during her passage to the state, such vessel shall be anchored at the place appointed for quarantine, and there remain, until permitted to remove by the commissioners of navigation, or by the commissioners of the town to which the vessel is bound, or by the justices aforesaid; and if any such vessel shall come to such town, or into its harbor, without permission obtained as aforesaid, the pilot or master, conducting the vessel, or ordering or permitting her to be conducted to such town or harbor, shall be guilty of a misdemeanor, and fined not less than one thousand dollars, and imprisoned not exceeding one year.

Sec. 517. Inland quarantine. 1885, c. 237.

Inland quarantine shall be under the control of the county superintendent of health, who, acting by the advice of the local board, shall see that disease dangerous to the public health, viz.: smallpox, scarlet fever, yellow fever and cholera, shall be properly quarantined or isolated at the expense of the city, or town, or county in which they occur. Any person violating the rules promulgated on this subject shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned at the discretion of the court. In case the offender be stricken with disease for which he is quarantinable, he will be subject to the penalty on recovery, unless in the opinion of the superintendent it should be omitted. Quarantine of ports shall not be interfered with, but the officers of the local and state boards shall render all the aid in their power to

quarantine officers in the discharge of their duties, upon the request of the latter.

Whenever and wherever a nuisance upon premises shall exist, which, in the opinion of the county superintendent of health, is dangerous to the public health, it shall be his duty to notify in writing the parties occupying the premises (or the owner, if the premises are not occupied), of its existence, its character and the means of abating it. Upon this notification the parties shall proceed to abate the nuisance, but failing to do this, shall be adjudged guilty of a misdemeanor, and shall pay a fine of one dollar a day, dating from twenty-four hours after the notification has been served. The amounts so collected to be turned over to the county treasurer: *Provided, however*, that if the party notified shall make oath or affirmation before a magistrate of his or her inability to carry out the directions of the superintendent, it shall be done at the expense of the town, city or county in which the offender lives. In the latter case the limit of the expense chargeable to the city, town or county shall not be more than one hundred dollars in any case: *Provided further*, that nothing in this section shall be construed to give the superintendent the power to destroy or injure property without a due process of law as now exists for the abatement of nuisances.

[NOTE.—For rules of the board of health, see chapter 237, Laws 1885.]

RAILROADS.

DISCRIMINATION—FREE PASSES.—Section 4 of chapter 320 of the act 1891 (Railroad Commission Act), which prohibits the making of a greater charge against one person than against another for like contemporaneous service under substantially similar circumstances and conditions, applies to the carriage of both persons and property without regard to the social, political or business influence or distinction of the persons served. *Railway*, 122—1052.

The transportation of any person, except the classes specified in section 23 of the Railroad Commission Act, without charge is unlawful under section 4, the offence being the free transportation and not the issuance of the free pass. *Ibid.*

The construction placed upon the statute by common carriers and by private individuals and officials will not be considered. *Ibid.*

Sec. 518 (1098). Railroads, plank roads, turnpikes and canals, maliciously destroying, obstructing and injuring, penalty when death ensues, and when not. R. C., c. 34, ss. 99, 100. 1838, c. 38. 1879. c. 255, s. 2.

If any person shall wilfully and maliciously put or place any matter or thing upon, over, or near any railroad track; or shall wilfully and maliciously destroy, injure, or remove the road-bed, or any part thereof, or any rail, sill, or other part of the fixture appertaining to, or constituting or supporting any portion of the track of such railroad; or shall wilfully and maliciously do any other thing with intent to obstruct, stop, hinder, delay, or displace the cars traveling on such road, or to stop, hinder or delay the passengers or others passing over the same; or shall wilfully and maliciously injure the road-bed or the fixtures aforesaid, or any part thereof, with any other intent whatsoever, such person so offending shall be guilty of a misdemeanor, and fined not exceeding one thousand dollars nor less than two hundred dollars and be imprisoned in the penitentiary or county jail, not less than four months nor more than ten years, and shall be committed to jail till he find surety for his good behavior, for a space of time not less than three nor more than seven years. And if it shall happen that by reason of the commission of the offences aforesaid, or any of them, any engine or car shall be displaced from the track, or shall be stopped, hindered or delayed, so that anyone thereby be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or be disabled in the use of any limb or member, then and in every such case, the party so offending, his counselors, aiders and abettors, on conviction, shall suffer death, if the persons were killed, and shall be imprisoned in the penitentiary not less than five nor more than sixty years, if the persons were maimed or disabled. And if any person shall maliciously destroy or injure any plank road, turnpike or canal, or any appurtenance or fixture belonging thereto, or used therewith, or shall maliciously destroy or injure any lock, dam or sluice, the same being a part of any work erected or made for the purpose of navigation, or improving the navigation of any water, the person so offending shall be guilty of a misdemeanor, and shall suffer the like punishment as in this section provided for maliciously injuring a railroad.

INDICTMENT FOR FAILURE TO KEEP UP FERRY.—An indictment against a railroad company for failure to keep a ferry in repair must set forth how the duty of keeping up the ferry and transporting passengers became imposed by their charter. Wil. & Man. R. R. Co., 44 (Busb.), 234.

RAILROAD CROSSINGS.—An indictment against a railroad company for obstructing a public highway "by placing in and across it certain plank,"

which fails to charge any misuse or misapplication of the plank in placing it across the road at the crossing, or that defendant suffered it to become ruinous, out of repair and in such improper condition as to obstruct the public road, does not charge any offence. Roanoke Railroad & Lumber Co., 109—.

Sec. 519. Person intoxicated may be refused ticket. 1885, c. 358.

The ticket agent of any railroad, steamboat, or other transportation company, doing business in this state, shall at all times have power to refuse to sell a ticket to any person applying for the same who may be at the time intoxicated.

The conductor, captain, or other person in charge of any train of railroad cars, steamboat, or other conveyance for the use of the traveling public, shall at all times have power to prevent any intoxicated person from entering such train, boat, or other conveyance.

It shall be unlawful for any intoxicated person after being forbidden by the conductor, captain, or other person having charge of any railroad train, steamboat, or other conveyance for the use of the traveling public, to enter such train, boat or other conveyance, and for every violation of this section the person so offending shall be guilty of a misdemeanor.

Sec. 520. Railroad tickets, unlawful for any person except agent to sell. 1891, c. 290.

It shall be unlawful for any person to sell or deal in tickets issued by any railroad company unless he is a duly authorized agent of said railroad company, and it shall be the duty of said agent to exhibit his authority to sell or deal in said tickets, and the company whose agent he is shall be responsible for his acts as such agent. That any violation of this law shall be a misdemeanor.

When any round-trip ticket is sold by any railroad company it shall be the duty of said company to redeem the unused portion of such ticket by allowing to the legal holder thereof the difference between the cost thereof and the price of a one-way ticket between the stations for which the said round-trip ticket was sold.

When any one-way or regular ticket is sold by any railroad company and when unused by the purchaser thereof it shall be the duty of the railroad company selling the ticket to redeem said ticket at the same price paid for it.

SELLER OF SINGLE TICKET NOT GUILTY.—One who sells a single railroad ticket can not be said to "sell or deal in tickets" within the meaning of the above statute. The words "sell or deal in tickets" imply not a particular sale but a multiplication of sales in the sense of a business. Ray, 109—.

The fact that railroad companies are required to "redeem the unused portions" of certain classes of tickets does not extend to enlarge the meaning and purpose of the section forbidding persons to "sell or deal in tickets" other than duly authorized agents of the railroad company. Ray, 109—.

Sec. 521 (1971). How trains to be arranged; penalty. 1871-'2, c. 138, s. 37. 1893, c. 351. 1895, c. 212.

In forming a passenger train, baggage, freight, merchandise or lumber cars shall not be placed in rear of the passenger cars, except in case of accident or when the cars are provided with automatic couplers or brakes; and if they or any of them shall be so placed, the officer or agent who so directed or knowingly suffered such an arrangement, and the conductor of the train, shall be guilty of a misdemeanor and punished accordingly. *Provided*, this section shall not apply to the Wilmington Seacoast Railroad Company.

Sec. 522 (1968). Pooling freights and rebates forbidden; penalty. 1879, c. 237, s. 2.

It shall be unlawful for railroad companies to pool freights or to allow rebates on freights; and all persons, whether railroad officials or others, who shall be concerned in pooling freights or who shall directly or indirectly allow or accept rebates on freights shall be guilty of a misdemeanor, and on conviction shall be fined not less than one thousand dollars or imprisoned not less than twelve months.

Sec. 523 (1972). Engineer intoxicated a misdemeanor. 1871-'2, c. 138, s. 38. 1891, c. 114.

If any person shall, while in charge of a locomotive engine running upon the railroad of any such corporation or while acting as the conductor or brakeman of a car or train of cars on any such railroad, be intoxicated, he shall be guilty of a misdemeanor.

Sec. 524 (1973). Railroad companies prohibited from loading or unloading freight cars on Sunday, and also from running locomotives or cars, except such as shall be run for carrying passengers or the mails. 1879, cs. 97, 203. 1885, c. 92. 1897, c. 126.

No railroad company shall permit the loading or unloading of any freight car on Sunday; nor shall permit any car, train of cars, or locomotive to be run on Sunday on any railroad, except such as may be run for the purpose of transporting the United States mails, and passengers with their baggage and ordinary express freight in an express car exclusively, and except such as shall be run for the purpose of transporting fruits, vegetables, live

stock and perishable freights exclusively: *Provided*, that the word Sunday in this section shall be construed to embrace only that portion of the day between sunrise and sunset; and that trains *in transitu*, having started on Saturday, may, in order to reach the terminus or shops, run until nine o'clock a. m. on Sunday, but not later, nor for any other purpose than to reach the terminus or shops. And any railroad company violating this section shall be guilty of a misdemeanor in each County in which such car, train of cars or locomotive shall run, or in which any such freight car shall be loaded or unloaded; and upon conviction shall be fined not less than five hundred dollars for each offence; the fine when collected to be paid to the state treasurer for the use of the public schools.

This statute contains nothing in its provisions suggestive of a purpose to interfere with interstate traffic, or indicative of any intent other than to prescribe a rule of civil conduct for persons in the territorial jurisdiction of the legislature; and, although to some intent and indirectly affecting interstate commerce, so far as it relates to trains engaged in carrying freight from one state to another on Sunday, it is not unconstitutional. *Southern Railway*, 119—814.

The provision that trains shall not run later than 9 o'clock Sunday morning was violated *prima facie* when defendant's train arrived at Greensboro at 10:25 o'clock a. m. on Sunday, and, if the defence relied upon to an indictment for running trains on Sunday, was that it was necessary to run later than the hour fixed by the statute in order to preserve the health or save the lives of the crew, it was incumbent upon the defendant to prove that the unlawful act was done under the stress of such necessity. *Southern Railway*, 119—814.

Where the only evidence offered in support of such defence was that water could not be obtained from a tank at a station passed by the train before reaching Greensboro, and that it could not have been obtained by pumping, the well being empty, and it appeared that food and water could have been obtained at any other station passed by the train: *Held*, that such evidence was insufficient, and the authorities of the railway company should have ordered the train to a siding at a time early enough to preclude all possibility of a necessity for violating the statute. *Ibid*.

While the state may not interfere with transportation into or through its territory "beyond what is absolutely necessary for self-protection," it is authorized, in the exercise of police power, to provide for maintaining domestic order and for protecting the morals of its people. *Southern Railway*, 119—814.

Sec. 525 (1974). Injuries to railroad a misdemeanor. 1871-'2, c. 138, s. 39.

If any person or persons shall wilfully do or cause to be done, any act or acts whatever whereby any building, construction, or work of any railroad corporation, or any engine, machine or structure or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed,

the person or persons so offending shall be guilty of a misdemeanor, and shall forfeit and pay to the said corporation treble the amount of damages sustained by means of such offence.

Sec. 526 (2001). *Officers of railroads to account to their successors; penalty for failure or refusal.* 1870-'1, c. 72, ss. 1, 3.

The president and directors of the several railroads, and all persons acting under them, are hereby required upon demand to account with the president and directors elected or appointed to succeed them, and shall transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, and anyone refusing or failing to account for and transfer all the money, books, papers, choses in action, property and effects, as herein required, shall be guilty of a misdemeanor, and shall be punished by imprisonment in the penitentiary for not less than one nor more than five years, and be fined at the discretion of the court. All persons conspiring with any such president, directors or their agents to defeat, delay or hinder the execution of this section shall be guilty of a misdemeanor, and punished in like manner.

Sec. 527 (1099). *Railroads, wilful injury to, without malice.* R. C., c. 34, s. 101.

If any person, unlawfully and on purpose, but without malice, shall commit any of the offences mentioned in the preceding section, he shall be guilty of a misdemeanor. And if it shall happen that by reason of the commission of any such offence any person shall be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or disabled in the use of any limb or member, then, and in every such case, the party so offending, his counsellors, aiders and abettors, shall be imprisoned not less than twelve months, and fined, at the discretion of the court.

Sec. 528 (1100). *Railroads, shooting at or throwing into cars, locomotives or trains, punishment.* 1876-'7, c. 4. 1887, c. 19.

If any person shall wilfully and unlawfully cast, or throw, or shoot, any stone, rock, bullet, shot, pellet, or other missile, at, against or into, any railroad car, locomotive or train, while the said car or locomotive shall be in progress from one station to another, or while the said car, locomotive or train shall be stopped for any purpose, the person so offending shall be guilty of a misdemeanor, and punished by fine or imprisonment in the county jail or penitentiary, at the discretion of the court.

INDICTMENT.—An indictment which fails to charge that the train was in actual motion or stopped for any purpose, is fatally defective. *Boyd*, 86—634.

STATE NOT BOUND TO PROVE THAT PISTOL WAS LOADED.—It is not necessary for the state to prove that a pistol discharged at a moving train was loaded, but if this fact is relied on as a defence defendant must prove it. *Hinson*, 82—597.

EVIDENCE—PRESUMPTION—INTENT.—Where the evidence shows that defendant was helplessly drunk when he shot at the train, the question of intent is properly left to the jury, and it is for them to say whether the presumption which the law raises that everyone intends to produce the consequences that result from his acts has been rebutted. *Barbee*, 92—820.

Sec. 529. Unlawful for any person to steal ride on train; venue. 1899, c. 625

SECTION 1. Any person other than a railroad employee in the discharge of his duty who, without authority from the conductor of the train or by permission of the engineer and with the intention of being transported free and without paying the usual fare for such transportation, rides or attempts to ride on top of any car, coach, engine or tender, or on any railroad in this state, or on the draw-heads between cars, or under cars on truss rods, or trucks or in any freight car, or on a platform of any baggage car, express car, or mail car on any train in this state shall be guilty of a misdemeanor.

SEC. 2. Any person charged with a violation of the first section of this act may be tried in any county in this state through which such train may pass carrying such person, or in any county in which such violation may have occurred or may be discovered.

RAPE.

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|-----------------|---------------------------------|
| 1. Indictment. | 5. Silence of the Prosecutrix. |
| 2. Evidence. | 6. Rape of Child. |
| 3. Penetration. | 7. Assault with Intent to Rape. |
| 4. Infants. | 8. Personating Husband. |

1. INDICTMENT.

The omission of the word "forcibly" is not fatal to the indictment when it is charged that the assault was violent and felonious, and that the ravishing was *felonious* and "*against her will*." *Johnson*, 67—55.

An indictment for assault with intent to commit rape, which charges that defendant "feloniously did make an assault, and her the said S then and there did beat, wound and ill-treat, with intent her the said S felo-

niously and unlawfully carnally to know and abuse," is fatally defective for failure to use words indicating that the intent was to be executed violently and against the will of the prosecutrix. Powell, 106—635.

It is no ground of objection that the name of the person ravished is charged in the indictment as *Susan*, while her real name is *Susannah*, when she is generally called *Susan*. Johnson, 67—55.

Where the indictment sets out the name of the prosecutrix in full, and charges that the prisoner did make an assault and "*her*" the said prosecutrix then and there violently and against "*her*" will feloniously did ravish and carnally know, the use of the word "*her*" discloses with sufficient certainty that the prosecutrix is a female. Farmer, 26 (4 Ired.), 224.

It is not necessary that the indictment should allege that the female ravished was over the age of ten years. Farmer, 26 (4 Ired.), 224.

TWO JOINTLY INDICTED.—Two or more persons may be guilty of the single crime of rape and may be jointly indicted therefor. Jordan, 110—491.

ELECTION.—There was evidence tending to show that the prisoner had had carnal intercourse with his daughter, a girl about twelve years old, forcibly and against her will, at various times for nearly two years prior to the finding of the indictment: *Held*, that it was not error to refuse to compel the prosecution to elect between the different transactions till the close of the state's evidence. Parish, 104—679.

Where there are several counts, each covering separate transactions, punishable in the same way, or only one count, but testimony as to two or more transactions, the judge may, in his discretion, refuse or allow a motion to compel the prosecution to elect, and may determine when the election shall be made, if at all. *Ibid*.

Where there are several counts in the indictment, drawn merely to meet the different phases of facts that will probably be proven, the court will neither quash nor require an election. *Ibid*.

2. EVIDENCE.

Evidence that the prosecutrix had been delivered of a bastard child is competent. Murray, 63—31.

Evidence of the prosecutrix that the prisoner seized her by the throat and threw her down, and "acted with her as a man acts with his wife and had full connection" with her, is sufficiently specific as to the fact of penetration. Hodges, 61 (Phil. Law), 231.

The fact that the prosecutrix had made an indecent exposure of her person to others, the prisoner not having been informed of it, is irrelevant. Henry, 50 (5 Jones), 65.

While a witness as to character may, of his own motion, say in what respect the character of the person asked about is good or bad, the party introducing him can only interrogate him as to the general character of such person; hence defendants charged with rape can not prove by their witness as to character of the prosecutrix that such character was bad for virtue. Hairston, 121—579.

Evidence that the prosecutrix had been the prisoner's concubine, or that he had been suffered to take indecent liberties with her, is not competent merely upon the prisoner's own declaration of such facts. Jefferson, 28 (6 Ired.), 305.

Evidence that the prosecutrix is a strumpet, or that she had had illicit intercourse with other men, *if her reputation for such conduct is general*,

is competent to discredit her, and as tending to disprove the probability of the use of force or fear by the prisoner. Jefferson, 28 (6 Ired.), 305.

Evidence of an offer of the husband of the prosecutrix to compound the prosecution is inadmissible, though the offer is made in the presence of the prosecutrix, since she had no right to interfere in the matter and her assent or dissent could avail nothing. Jefferson, 28 (6 Ired.), 305.

Where the prosecutrix is impeached on cross-examination, it is competent to prove by her brother that the prisoner took her out of bed when she was sleeping with witness, at a time when she had testified that the prisoner ravished her, and that he heard what she told their mother on that occasion, to corroborate her, and also that his mother ordered that the prosecutrix be removed to another bed, as a part of the *res gestae*. Parish, 104—679.

Evidence that the prisoner and his wife lived amicably together after such intercourse with the daughter did not tend to contradict the prosecutrix, and was incompetent. *Ib.*

After the solicitor had elected to rely upon a particular transaction when her father, the prisoner, penetrated her person, it was not error to instruct the jury that they could not convict of an assault with intent to commit rape, though the testimony and other transactions tended to prove only that offence. *Ibid.*

The testimony of the mother of prosecutrix in a case of rape, that prosecutrix's brother told her that he saw defendant on top of his sister with his hand over her mouth, and that she was trying to get up, is admissible in corroboration of the testimony of prosecutrix and her brother, they having previously testified to the same thing. Powell, 106—635.

In such case it is the duty of the court to instruct the jury that they could consider such testimony only as in corroboration of that of prosecutrix and her brother, but where the record fails to show whether this was done, it will be presumed that the court gave the proper instructions. *Ibid.*

Where the prisoner proves that the prosecutrix had accused two other persons of the offence, evidence that *subpoenas* were issued for these persons and the sheriff returned that they were not to be found, is incompetent. Starnes, 94—973.

Where a witness is impeached, and the impeaching witness testifies that the impeached witness had been accused of larceny, and had run away, it is incompetent to ask whether it was not impossible for one in the station in life of the impeached witness to give bail, with a view of showing that the witness ran away to escape imprisonment. *Ib.*

Declarations of the prisoner made to the officer on being arrested for the alleged offence, are not admissible as a part of the *res gestae*. McNair, 93—628.

Where the prisoner sets up a defence that he was under fourteen years of age when the alleged offence was committed, the burden is on him to prove it, and the jury may look on him and judge his age from his appearance. *Ib.*

Where defendant introduces evidence as to his good character, it is not competent for the state in reply to show that there was a general rumor in the community of defendant's running after a certain woman. Laxton, 76—216.

It is not error to allow a witness to testify when first examined as to consistent or similar statements made by him to others when such witness is subsequently impeached. Freeman, 100—629.

On trial for rape it is error to refuse to allow defendant to show by the prosecutrix that she had formerly given birth to a bastard, but such error is cured when the fact is afterwards admitted. *Ib.*

CHARGE.—On indictment for rape, there was much and conflicting evidence as to whether there was force employed by the prisoner, or that the connection with the prosecutrix, which was admitted by the prisoner, was with her consent, and the court, after correctly laying down the general principles of the law and calling attention to the contradictory statements of prosecutrix and defendant, charged the jury that the only question was whether carnal connection was had by force and against the will of the prosecutrix, and that all the other testimony was only competent as bearing on that question: *Held*, that there was error; the court should have directed the attention of the jury to, and instructed them upon the effect, if believed, of the testimony in respect to the time, place and circumstances surrounding the alleged crime, the conduct of the prosecutrix preceding and immediately following it, her condition as shown soon thereafter, and such other facts as tended to contradict or support her. *Boyle*, 104—800.

Where the judge in charging the jury in a case of rape expresses his strong indignation that persons in hearing of the alleged violence did not rush to the rescue of the person upon whom it was committed, and also expresses his eagerness and desire to punish them for their cowardice, such expressions amount to an intimation of an opinion on the facts. *Brown*, 67—435.

An instruction that an *alibi* is good defence if proven to the satisfaction of the jury, is not objectionable as conveying an intimation that the burden of proving it is on the prisoner. *Starnes*, 94—973.

The trial judge, in summing up the evidence of the prosecutrix, said: "Whether her testimony be true or false, she testified most positively that the prisoner was the man who committed the rape upon her," and was about to proceed, when his attention was called to the fact that he had failed to state that the prosecutrix had said that she did not know the woman C G, to which the judge replied: "Yes, I believe she did say that": *Held*, that such a remark was sufficiently responsive to the request of counsel, and did not amount to the expression of an opinion. *Freeman*, 100—429.

EXPRESSION OF OPINION—WHAT IS NOT.—Whether the inference arising from the failure of the prosecutrix to make outcry is repelled by the other concurrent facts, is not a conclusion of law, but a question of fact, and the judge has no right to say that such inference is rendered by such concurring facts of little or no weight. *Cone*, 46 (1 Jones), 18.

Where the prosecutrix while testifying as to the circumstances of the crime hesitated and wept, it was not error for the court, on directing her to proceed, to add: "You need not use language that will shock your modesty." *Laxton*, 78—564.

During the trial certain members of the family of the prosecutrix sat within the bar and occasionally wept during the argument of the prosecuting counsel, but withdrew when the prisoner's counsel addressed the jury: *Held*, that any action of the trial judge in the matter was within his discretion and not the subject of review. *Laxton*, 78—564.

When defendant, without the direction or sanction of the court, causes the jailer to bring a prisoner in court to testify, it is not error for the judge to order the witness sent back to jail after testifying. *Hairston*, 121—579.

3. PENETRATION.

Sec. 530 (1105). Rape and buggery, what proof sufficient in; penetration. 1860-'1, c. 30.

It shall not be necessary upon the trial of any indictment for the offences of rape, carnally knowing and abusing any female child under ten years of age, and buggery, to prove the actual emission of seed in order to constitute the offence, but the offence shall be completed upon proof of penetration only.

The least penetration of the person of a female against her will is sufficient to constitute rape. Hargrave, 65—466.

The law does not require that the prosecutrix should use any particular form of words in stating that the prisoner penetrated her body. It is enough if words are used which convey to the jury the idea that the prisoner had carnal knowledge, or that he penetrated her body, and saying of the prisoner that he "acted with her as a man acts with his wife," and that he had "full connection" with her, is sufficient proof of the penetration. Hodges, 61 (Phil. Law), 231.

4. INFANTS.

INFANTS UNDER FOURTEEN CAN NOT COMMIT RAPE.—An infant under the age of fourteen years can not commit rape, nor be guilty of an assault with intent to commit rape. Sam, 60 (Winst. Law), 300.

BURDEN OF PROOF.—Where infancy is relied on as a defence, the burden is on the defendant to show that he was under fourteen years of age. McNair, 93—628.

APPEARANCE OF PRISONER.—The jury may look on the prisoner and judge from his appearance whether he was fourteen years of age when the alleged offence was committed. McNair, 93—628.

5. SILENCE OF PROSECUTRIX.

The inference arising against the truth of a charge of rape from a long silence on the part of the female, is not a presumption amounting to a rule of law, but is a matter of fact to be passed on by the jury. Peter, 53 (8 Jones), 19.

The silence, or failure of the female to make outcry immediately after the commission of the offence, is a circumstance tending to show consent on her part, or to impeach her credibility as a witness, the presumption being that a forcible violation of her person so outrages the female instinct that a woman, not only will make an outcry for aid at the time, but will instantly, after its perpetration, seek some one to whom she can make known the injury and give vent to her feelings. Peter, 53 (8 Jones), 19.

6. RAPE OF CHILD.

Sec. 531 (1101). Rape of child under ten punished with death; under fourteen, imprisoned. R. C., c. 34, s. 5. 18 Eliz., c. 7. 1868-'9, c. 167, s. 2. 1895, c. 295.

Every person who is convicted of ravishing and carnally knowing any female of the age of ten years or more by force and against

her will, or who is convicted, of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death, and every person who is convicted of unlawfully and carnally knowing, abusing any female child ten years old and under age of fourteen, shall be guilty of a crime, and shall be punished by a fine or imprisonment in the state prison, at the discretion of the court: *Provided*, she has never before had sexual intercourse with any male person.

PUNISHMENT.—Unlawfully to carnally know and abuse a female under the age of ten years constitutes the crime of rape, and one convicted of such crime may be punished by imprisonment in the penitentiary. Dancy, 83—608.

INDICTMENT—PROOF.—An indictment for an assault with intent to commit a rape is supported by proof of an assault with intent to unlawfully and carnally know and abuse a female child under ten years of age, though the indictment says nothing about the age. Johnston, 76—209.

INTENT.—An indictment which alleges that defendant "did make an assault and did then and there unlawfully attempt to carnally know" the female child, is fatally defective for failure to charge the *intent* with which the assault was made. Goldston, 103—323.

WHEN AGE MUST BE STATED.—Where the indictment simply charges that the act was with force and against the will of prosecutrix, but fails to state that she was under ten years of age, a charge that the prisoner is guilty if he had unlawful and carnal knowledge of prosecutrix, she being at the time under ten years of age, whether she consented or not, is erroneous. When the act is with the child's consent, her age must be given in the indictment. Johnson, 100—494.

MAN AND WOMAN GUILTY.—A man and a woman are both guilty of abusing and carnally knowing a female child where both caused the child to become drunk and the man had intercourse with the child while the woman held her. Hairston, 121—579.

EVIDENCE—FORMER CONDUCT OF PROSECUTRIX.—On trial of an indictment for rape of a child twelve years of age it was not error to refuse to permit a witness to state that the prosecutrix had proposed to have sexual intercourse with him, when defendant did not propose to show that the witness had actually had intercourse with her. Hairston, 121—579.

CHARGE.—Where an indictment contained two counts, one for rape and the other for abusing and carnally knowing a female child, and defendant was convicted of the lesser offence, he can not complain that the judge stated to the jury that the punishment for rape was death and for the other offence imprisonment only. Hairston, 121—579.

7. ASSAULT WITH INTENT TO RAPE.

Sec. 532 (1102). Rape, assault with intent to commit. 1868-'9, c. 167, s. 3. R. C., c. 107, s. 44. 1823, c. 1229.

Every person convicted of an assault with intent to commit a rape upon the body of any female, shall be imprisoned in the penitentiary not less than five nor more than fifteen years.

NOT NECESSARY TO ALLEGE THAT THE PRISONER WAS A MALE.—On indictment of a person of color for an assault with intent to commit rape, it is

not necessary to allege that the accused is a *male* person. Tom, 47 (2 Jones), 414.

NOT NECESSARY TO ALLEGE THAT THE PROSECUTRIX IS OF THE HUMAN SPECIES.—It is not necessary, in an indictment for an assault with intent to commit rape, to allege that the female assaulted was of the human species. Tom, 47 (2 Jones), 414.

CHARGING "INTENTION" INSTEAD OF "INTENT."—An allegation that the assault was made with an "intention" to ravish instead of an "intent" is sufficient. The formality is cured by section 262 (The Code, sec. 1183). Tom, 47 (2 Jones), 414.

JURISDICTION.—The superior court has jurisdiction to proceed to judgment where the indictment charges an assault with intent to commit rape, though the jury convict of the assault only. Reaves, 85—553.

PUNISHMENT.—Where the indictment charges an assault with intent to commit rape, and defendant submits for a simple assault, the superior court may pass sentence, but can not imprison defendant for longer than thirty days, nor fine him more than fifty dollars. Johnson, 94—863.

PUNISHMENT ON CONVICTION FOR SIMPLE ASSAULT WITHOUT INJURY.—Where, on indictment for assault with intent to commit rape, the conviction is for a simple assault, and there is no evidence that the prosecutrix suffered from bodily pain at all, the punishment can not exceed a fine of fifty dollars or imprisonment for thirty days. Nash, 109—824.

INTENT MUST BE CLEARLY SHOWN.—The intent is a question of fact for the jury and not for the court, and is a material and essential ingredient of this offence and must be established beyond a reasonable doubt. DeBerry, 123—703.

WHAT NECESSARY TO CONVICT.—To convict one charged with an assault with intent to commit rape, the evidence must show not only an assault but an intent on the part of the defendant to gratify his passion on the person of the woman, notwithstanding any resistance she might make. Jeffreys, 117—743.

INDICTMENT.—An indictment for assault with intent to commit rape which charges that defendant "feloniously did make an assault and her the said S then and there did beat, wound and ill-treat, with intent her the said S feloniously and wilfully carnally to know and abuse," is fatally defective for failure to use words indicating that the intent was to be executed violently and against the will of the prosecutrix. Powell, 106—635.

The omission of the word "feloniously" in the indictment is a fatal defect. Scott, 72—461.

HUSBAND AND WIFE.—A husband who, by presenting a loaded gun at the parties and threatening to kill them in case of refusal, compels his wife to submit to, and a man to attempt, sexual connection, is guilty of an assault with intent to commit rape on his wife. Merrimon, J., dissenting. Dowell, 106—722.

CONSENT OF FEMALE ON CONDITION.—If the prosecutrix consents on certain terms which defendant refuses, and then attempts to carnally know her without her consent, he is guilty. Long, 93—542.

FEMALE AIDING GUILTY.—A female who aids and abets a male assailant in an attempt to commit a rape, becomes thereby a principal in the offence. Jones, 83—605.

EVIDENCE.—The testimony of the mother of the prosecutrix that prosecutrix's brother told her that he saw defendant on top of his sister with his hand over her mouth, and that she was trying to get up, is admissible

in corroboration of the testimony of the prosecutrix and her brother, they having previously testified to the same thing. *Powell*, 106—635.

Evidence that the prosecutrix is a lewd woman goes to her credit, and is competent. *Long*, 93—542.

On indictment for assault with intent to commit rape, evidence of the reputation of the prosecutrix for virtue is competent. *Daniel*, 87—507.

EVIDENCE SUFFICIENT TO CONVICT.—Evidence that the prosecutrix, while going alone to the house of an acquaintance in the night-time, was pursued by defendant, who seized her around the neck with both hands and threw her down and put his hands over her mouth, is sufficient to warrant a verdict of guilty. *Mitchell*, 89—521.

The evidence was that soon after the prosecutrix left the railroad she heard the prisoner, a colored man, "holler" to her to stop, and saw him running after her, distant about seventy yards. The prosecutrix then began to run, and was rapidly pursued by the prisoner who "hollered" three times to her to stop. The prisoner was approaching her until the road emerged from the woods into a lane, and when he reached the lane and saw the dwelling-house of her brother-in-law, he fled into the woods: *Held*, that the evidence was sufficient to be left to the jury. *Rodman and Bynum, J. J.*, dissenting. *Neely*, 425. Overruled in *State v. Massey*, 86—653.

The defendant seized the prosecutrix, threw her upon the ground, put his hand over her mouth, pulled up her clothes, unbuttoned his pants, and put his hands on her person and got upon her, but she forcibly resisted, and defendant arose because, as the prosecutrix "supposed," she outdid him: *Held*, that the evidence was sufficient to be left to the jury as to the intent to rape, and it was not error to refuse an instruction that the jury could not convict the defendant of a greater offence than a simple assault. *Williams*, 121—628.

EVIDENCE NOT SUFFICIENT TO CONVICT.—The evidence was that the prosecutrix, while going from her house to her mother-in-law's, about a mile distant, was carrying her child in a baby-carriage, and was accompanied by a boy six years of age. Soon after passing defendant's house, she heard defendant, who was about seventy-five yards off, say: "Halt, I intend to ride in the carriage. If you don't halt, I'll kill you when I get hold of you." She ran and called for her mother-in-law until she got to the gate where she met another woman, to whom she related the matter, but when she turned to show the man he was gone: *Held*, that the evidence was insufficient to warrant a conviction. *Massey*, 86—658.

The prosecutrix testified that the defendant, at her house, caught hold of her and tried to throw her on the bed; that she told him to let her go, and he then threw her on the bed and pulled up her clothes a little way; she got away from him and ran off; defendant threatened to kill her if she told it: *Held*, error to charge that if the jury believed these facts defendant would be guilty, since the charge assumes as a fact that defendant intended to accomplish his purpose at all hazards while the intent is a question for the jury alone. *DeBerry*, 123—703.

The evidence was that defendant, while in a sitting posture on a path leading from the prosecutrix's house to a well, solicited her, as she passed on her way to the well, to have sexual intercourse with him; that on her replying that she was not that kind of a woman, he followed her, with his privates exposed, to a fence near the well, but did not go beyond it, and that he was at no time nearer to her than twelve feet: *Held*, the evidence of the felony was not sufficient to be submitted to the jury. *Jeffreys*, 117—743.

CHARGE.—The defendant, a boy about fifteen years of age, was found on the prosecutor's child, a little girl of about six, she being on her back with her clothes up. The court in charging the jury remarked with emphasis, "Why was she on her back, and why was he on her?": *Held*, that such remark was in violation of the statute forbidding the trial judge to express an opinion on the facts. *Dancy*, 78—437.

VERDICT MAY BE FOR SIMPLE ASSAULT.—On indictment containing, a single count charging an assault with intent to commit rape, the jury may convict of a simple assault, and the court proceed to judgment. *Perkins*, 82—681.

ABANDONMENT OF INTENT.—Where a negro made an assault upon a white woman with an intent to ravish her, and afterwards changed his purpose and desisted, it was held that he was guilty under the statute. *Elick*, 52 (7 Jones), 68.

It was not error to charge that "if the jury are satisfied beyond a reasonable doubt that the defendant laid hands upon the prosecutrix violently and against her will, for the purpose of having sexual intercourse with her, and that, at the time he so laid hands upon her, he intended to accomplish his purpose at all hazards in defiance of and notwithstanding any resistance she might make, then the defendant was guilty of an assault with intent to commit rape, although he may have subsequently abandoned his purpose." *Williams*, 121—628.

PHYSICIAN FRAUDULENTLY OBTAINING CONSENT.—A physician was indicted for assault with intent to rape a girl seventeen years of age, and the only question was whether the improper liberties he took with her person were had by her consent fraudulently obtained, as by pretending he would see if she had womb disease. The court charged that "if he acted in good faith as a physician, and did what he did as such, he is not guilty; otherwise, he is guilty": *Held*, that the charge was erroneous, since if she consented to what he did, and made no objection because she was indifferent or ready to submit, he is not guilty, though she understood that he was not acting in good faith as a physician. *Nash*, 109—824.

VERDICT—EFFECT.—A simple verdict of guilty, without specifying a lower offence than that charged in the indictment, is a verdict of guilty of the offence charged. *Barnes*, 122—1031.

Where there is no evidence applicable to the count for assault with intent to rape, and the jury are properly so instructed, a general verdict of guilty is wrong. *Hight*, 124—845.

Where an indictment charges an assault with intent to commit a rape, and also a simple assault, a general verdict of guilty applies to the first count as well as to the second. *Hight*, 124—845.

8. PERSONATING HUSBAND.

Sec. 532 (1103). Rape, carnal knowledge of married woman by fraud in personating her husband declared to be felony. 1881, c. 89, s. 1.

Every person who shall have carnal knowledge of any married woman by fraud in personating her husband, shall be guilty of a felony, and punished by imprisonment in the penitentiary at hard labor not less than ten nor more than twenty years.

Sec. 534 (1104). Rape, assault with intent to have carnal knowledge of married woman by fraud in personating her husband, how punished. 1881, c. 89, s. 2.

Every person convicted of an assault upon any married woman, with intent to have knowledge of her by fraud in personating her

husband, shall be punished by imprisonment in the penitentiary at hard labor not less than five nor more than fifteen years.

CHARGE.—A person who attempts to have carnal knowledge of a married woman through fraud in personating her husband can not be convicted of an assault with intent to commit rape, and, therefore, on indictment in such case, it is error to charge the jury that defendant is guilty if "he intended to do so by committing a fraud upon her by falsely personating her husband," since an assault with intent to commit rape must be such as would amount to rape if the purpose had been accomplished, and if defendant's intention was to have the connection by exciting and soliciting her consent without force, or by fraud in personating her husband, he would not be guilty. Brooks, 76—1.

NOTE.—This case was decided before the enactment of the above statute.

DEFENDANT'S INTENTION A QUESTION FOR THE JURY.—The intention of the defendant in such case, however, is a question for the jury, and if they should find that his intention was to accomplish his purpose by force and against the will of the prosecutrix, he would be guilty. Brooks, 76—1.

REASONABLE DOUBT.

No set formula is required in defining "reasonable doubt;" it means fully satisfied, or satisfied to a moral certainty. Whitson, 111—695.

It is not error to refuse to charge that if one of the jurors had a reasonable doubt as to the guilt of the defendant the others should yield to him. Bowman, 80—432.

Reasonable doubt is not a necessary formula, and it can only be required in any case that the judge impress upon the jury the principle that the innocent must not be punished. Sears, 61 (Phil.), 146; Knox, 61 (Phil.), 312.

An instruction that reasonable doubt means that, after a consideration of all the evidence, with all the light derived from the argument of counsel and the instructions of the court, the jury ought not to convict unless they felt that their minds were involuntarily led to the conviction that the prisoner was guilty as charged, is not erroneous. Gould, 90—658.

REBELLION OR INSURRECTION.

Sec. 535 (1106). Rebellion or insurrection against the state, a high crime. 1868, c. 60, s. 2. 1861, c. 18. 1866, c. 54. Const., Art. IV, s. 5.

If any person shall incite, set on foot, assist or engage in a rebellion or insurrection against the authority of the state of North Carolina or the laws thereof, or shall give aid or comfort thereto,

every person so offending in any of the ways aforesaid, shall be guilty of a high crime, and punished by imprisonment at hard labor for not more than fifteen years, and be fined not more than ten thousand dollars.

Sec. 536 (1107). *Rebellion or insurrection, conspiracy to destroy the government of the state by.* 1868, c. 60, s. 1.

If two or more persons shall conspire together to overthrow or put down, or destroy by force, the government of North Carolina, or to levy war against the government of this state, or to oppose by force the authority of said government, or by force, or by threats, to intimidate, or to prevent, hinder or delay the execution of any law of the state, or by force or fraud to seize or take possession of any firearms or property of the state aforesaid, against the will or contrary to the authority of said state, every person so offending in any of the ways aforesaid, shall be guilty of a high crime, and imprisoned not more than ten years and be fined not exceeding five thousand dollars.

RECEIVING STOLEN GOODS.

See LARCENY.

RECOGNIZANCES.

Sec. 537 (1205). *Judges may lessen or remit recognizances at any time.* R. C., c. 35, s. 38. 1788, c. 292, s. 1.

The judges of the superior, criminal and the presiding officers of the inferior courts may hear and determine the petition of all persons, who shall conceive they merit relief on their recognizances forfeited; and may lessen, or absolutely remit the same, and do all and anything therein, as they shall deem just and right and consistent with the welfare of the state and the persons praying such relief, as well before, as after final judgment entered and execution awarded.

Sec. 538 (1206). Clerk to refund remitted forfeitures paid into office. R. C., c. 35, s. 39. 1795, c. 422, s. 1.

The clerk of the superior, criminal or inferior courts, on the remission of any forfeited recognizance which has been paid into his office, shall refund the same, or so much thereof as shall be remitted.

Sec. 539 (1207). County treasurer to refund, when paid to him. R. C., s. 40. 1795, c. 442, s. 2.

If the money has been paid to the county treasurer, he shall refund it to the person entitled, on his producing an attested copy of the record from the clerk of the court, certifying that such recognizance hath been remitted or lessened, signed with his own proper name, with the seal of the court affixed thereto.

Sec. 540 (1208). Execution not to issue until the issuing of the notice. R. C., c. 35, s. 43. 1777, c. 115, s. 48.

No execution shall issue upon a forfeited recognizance, or to collect a fine imposed *nisi*, until a notice has issued against the person and his sureties, who has forfeited his recognizance or upon whom the fine has been imposed.

Sec. 541 (1209). Joint notice to issue on forfeited recognizances. R. C., c. 35, s. 44. 1812, c. 836, s. 1.

When any recognizance, acknowledged by a principal and sureties, shall be forfeited by two or more of the recognizers, the notice issued thereon shall be jointly against them all, designating which of them are principals and which sureties, and when they are bound in different sums, stating the amount forfeited by each one; and the clerk shall have no greater fee on such notice than is due when it is issued against one defendant.

Sec. 542 (1210). How notices executed. R. C., c. 35, s. 45. 1812, c. 836, s. 2.

All notices issuing upon forfeited recognizances shall be executed by leaving a copy with each of the defendants, or at his present place of abode. And in case he can not be found, and has no place of abode, and the matter be returned, then a notice shall issue, and on the like return, the same shall be deemed duly served.

Sec. 543 (1220). Duty of magistrate on return of warrant. 1868-'9, c. 178, sub chap. 2, s. 5.

Upon the person complained of being brought before the magistrate, he may be required to enter into a recognizance, payable to the state of North Carolina, in such sum not exceeding one thou-

sand dollars, as such magistrate shall direct, with one or more sufficient sureties, to appear at the next term of the court having jurisdiction in the county in which the offence is charged to have been committed, and not to depart the same without leave, and in the meanwhile to keep the peace and be of good behavior towards all the people of this state, and particularly towards the person requiring such security.

Sec. 544 (1221). When party complained of discharged and when imprisoned. 1868-'9, c. 178, sub chap. 2, s. 6.

If such recognizance shall be given, the party complained of shall be discharged; if such person shall fail to find such security, it shall be the duty of the magistrate to commit him to prison until he shall find the same, specifying in the *mittimus* the cause of commitment and the sum in which such security was required.

Sec. 545 (1222). How discharged subsequently. 1868-'9, c. 178, sub chap. 2, s. 7.

Any person committed for not finding sureties of the peace as above provided, may be discharged by any magistrate upon giving such security as was originally required of such person, or by a justice of the supreme court, or judge of the superior or criminal court, by giving such other security as may seem sufficient.

Sec. 546 (1223). Recognizance to be returned to next term of court. 1868-'9, c. 178, sub chap. 2, s. 8.

Every recognizance taken pursuant to the foregoing provisions shall be transmitted by the magistrate taking the same to the next term of the superior, criminal or inferior court for the county in which the offence is charged to have been committed.

Sec. 547 (1224). Persons committing breach of the peace in presence of the court may be required to give security, or be imprisoned. 1868-'9, c. 178, sub chap 2, s. 9.

Every person who, in the presence of any magistrate above specified, or in the presence of any court of record, shall make any affray, or threaten to kill or beat another, or to commit any offence against his person or property; and all persons who, in the presence of such magistrate or court, shall contend with hot and angry words, may be ordered by such magistrate or court, without any other proof, to give such security as above specified, and in case of failure so to do, may be committed as above provided.

Sec. 548 (1225). Proceedings on recognizances. 1868-'9, c. 178, sub chap. 2, s. 10.

Every person who shall have entered into a recognizance to keep the peace shall appear according to the obligation thereof;

and if he fail to appear, the court shall forfeit his recognizance and order it to be prosecuted, unless reasonable excuse for his default be given.

How DISCHARGED.—An agreement by a solicitor to discharge a defendant if he would become a state's witness against a co-defendant, which he did, so far as to go before the grand jury and be examined, and then left the court, will not relieve such defendant from a forfeited recognizance. A recognizance is a matter of record, and can only be discharged by a record or something of equal solemnity. *Moody*, 69—529.

FORM OF.—A recognizance in the form of a bond with conditions, signed and sealed by defendant and his sureties, is valid. *Jones*, 100—438.

FAILING TO GIVE NEW BOND ON CONTINUANCE.—Defendant having entered into a recognizance to appear at a certain term, appeared at said term and the cause was continued, but he was required to give another bond for his appearance at the succeeding term, which he failed to do, and departed without leave of the court: *Held*, that it was proper to call him out afterwards and enter judgment against him. *Smith*, 66—620.

AMENDMENT OF RECORD.—On motion for judgment on a forfeited recognizance, it appeared that the record recited that defendant "should appear on Thursday and not depart the court without leave." The surety offered proof that the defendant remained in court all day on the said Thursday, but on motion of the solicitor the court amended the record *nunc pro tunc* by adding "that he do not depart the court without leave": *Held*, that the amendment was not unauthorized, but in the discretion of the court, and when made, the record stood as if it had never been defective. *Warren*, 95—674.

WHEN A RECOGNIZANCE IS FORFEITED.—A recognizance conditioned for the appearance of the defendant on one day is not forfeited by his failure to appear at another day to which the holding of the court was changed after taking the recognizance. *Melton*, 44 (*Busb.*), 426.

A recognizance conditioned that the defendant appear at the next term binds the defendant, though neither time nor place is specified. *Houston*, 74—174.

Where a recognizance is conditioned for the appearance of the defendant on the eighth Monday after the fourth Monday in March, and an additional term is provided by statute to meet in February, the recognizance is not forfeited by the failure of defendant to appear at the February term. *Houston*, 74—174.

PRACTICE IN ENFORCING RECOGNIZANCES.—Where a defendant is recognized to appear and fails, and his recognizance is declared forfeited, and *scire facias* is issued against him to show cause "why execution should not issue for a *fine* on a forfeited recognizance," a plea of *nul tiel record* can not be sustained. The use of the word *fine* is surplusage, but defendant is not likely to misapprehend the meaning of the *scire facias* on account of it. *Dickenson*, 7 (3 *Murph.*), 10.

A *scire facias* which sets forth that the defendant was fined *nisi* "according to act of assembly" is not supported by an entry that the defendant, being under a recognizance, "was called and failed," and a plea of *nul tiel record* will be sustained. *Raiford*, 13 (2 *Dev.*), 214.

RECOGNIZANCE IN FORM OF A BOND SUFFICIENT.—It is competent for a judge to authorize the sheriff, or any other person, to take a recognizance from a defendant for his appearance at the next term, the judge having first fixed the amount of such recognizance; and although the recognizance thus authorized to be taken is put in the form of a bond with con-

ditions, signed and sealed by the defendant and his sureties, it is valid as a recognizance. Houston, 74—549.

WHO MAY TAKE RECOGNIZANCES.—Regularly, if a person be committed for want of sureties to keep the peace, and he afterwards becomes able to give them, he should be taken by *habeas corpus* before a judge for the purpose of entering into a recognizance; but in our practice the court generally, by consent of the prosecuting officer, entrusts the power of taking the recognizance to a justice of the peace. Hill, 25 (3 Ired.), 398.

RECOGNIZANCE TO APPEAR AT A COURT NOT HAVING JURISDICTION OF THE OFFENCE.—A recognizance is not void because the court to which the defendant is bound to appear has no jurisdiction of the offence charged. The obligation of the recognizance does not depend upon the inquiry whether the court before which the party is required to appear has jurisdiction of the offence, but upon the duty and power of the magistrate to examine and admit such party to bail; therefore, a recognizance for the appearance of a party to the county court is good, and if the party fail to appear may be enforced, though the offence charged is cognizable only in the superior court. Edney, 20 (4 D. & B.), 378.

The duty of judging correctly whether the court to which a defendant is bound to appear has jurisdiction of the offence charged is not imposed on the magistrate so imperatively as to make his mistake, if he should make one, a justification of the accused for disregarding his recognizance. Edney, 20 (4 D. & B.), 378.

Where a defendant is bound to appear before a court not having jurisdiction of the offence charged, such court may ascertain what other court has jurisdiction to try and punish, and may commit or bind the party to answer in the court having jurisdiction. Edney, 20 (4 D. & B.), 378.

WHAT A RECOGNIZANCE IS.—A recognizance is a debt of record and is in the nature of a conditional judgment which the recorded default makes absolute, subject only to such matters of legal avoidance as may be shown by plea, or to such matters of relief as may induce the court to remit or mitigate the forfeiture. Mills, 19 (2 D. & B.), 552.

OBJECT OF THE *SCIRE FACIAS*.—The object of a *scire facias* is to notify the cognizor to show cause why the cognizee should not have execution for the sum acknowledged. Mills, 19 (2 D. & B.), 552.

NO JUDGMENT OF FORFEITURE REQUIRED.—The recorded default makes the judgment absolute subject only to matters of avoidance, and no judgment of forfeiture is required before issuing the *scire facias*. Mills, 19 (2 D. & B.), 552.

JUDGMENT MUST BE HAD ON *SCI. FA.* BEFORE EXECUTION ISSUES.—The statute makes it imperative that the *scire facias* shall issue and judgment be had thereon previous to suing out execution upon the forfeited recognizance. Mills, 19 (2 D. & B.), 552.

ADJOURNMENT OF JUSTICE'S COURT.—Where a criminal case before a justice was not concluded on the day set for trial, but was postponed to a subsequent day, defendants' bond to appear on the day set for trial bound him to appear on the day to which the adjournment was made. Jenkins, 121—637.

MUST ATTEND UNTIL DISCHARGED.—When one appears in court, in obedience to the requirement of his bond, and submits himself to the jurisdiction of the court, he continues under the penalty of the bond until the trial is terminated or until he is discharged by the court. Jenkins, 121—637.

SCI. FA. NOT NECESSARY.—It is not necessary to issue a *scire facias* returnable to the next term of a court after the judgment *nisi* is taken on an appearance bond. Jenkins, 121—637.

INTERVENING SPECIAL TERM.—A defendant bound over to appear at a regular term which is not held in consequence of the absence of the judge is required by virtue of section 919, of The Code, to attend an intervening special term subsequently appointed and held. Horton, 123—695.

NO RECOGNIZANCE WHEN NOL PROS. ENTERED.—Where a *nolle prosequi* is entered the defendant is not required to enter into a recognizance for his appearance at any other term. The solicitor, after entering a *nol pros.*, may have a *capias* issued returnable to next term upon the same indictment. Thorton, 35 (13 Ired.), 256.

DEFECTIVE SCIRE FACIAS ON FORFEITED RECOGNIZANCE.—A *scire facias* reciting that the defendant "was lately bound in a recognizance in the sum of five hundred dollars for the appearance of T S at, etc., that the said T S failed to make his appearance as he was bound to do; and that it was therefore ordered by the said court that he forfeit his recognizance according to law," is irregular, uncertain and defective. It is defective in not setting forth the recognizance fully, to whom, or where made, and that the same is of record in the court from which the *sci. fa.* was sued out. It is defective and uncertain in setting forth that T S failed to appear as he was bound to do instead of averring that he failed to appear at the court when and where, according to the condition of the recognizance, he was bound to make his appearance. It is irregular in setting forth that it was ordered that he should forfeit his recognizance, and requiring the defendant to show cause why this forfeiture should not be made absolute. Mills, 19 (2 D. & B.), 252.

RECOGNIZANCE MAY BE AMENDED.—Where the record of a *scire facias* on a recognizance taken in the county court and the record of the recognizance itself differs, the county court may amend the entry of the recognizance after appeal to the superior court. Cherry, 13 (2 Dev.), 550.

WHAT COURT ENFORCES.—Recognizances are not commonly to be originally proceeded on in another court, but only in that court which takes them. Cherry, 13 (2 Dev.), 550.

HOW MADE UP.—Recognizances are not made up of separate parchments, but notes are made of them on the minutes, and from these formal recognizances may be drawn out at any time. Cherry, 13 (2 Dev.), 550.

COPIES TO BE SENT TO APPELLATE COURT.—If suits on recognizances are to be removed to another court by appeal, the original recognizance as a distinct record enrolled by itself is not sent up, but copies are used, and if the recognizance is defectively drawn from the note on the minutes, the defect may be cured by having it properly engrossed. Cherry, 13 (2 Dev.), 550.

Sec. 549 (1226). If complainant does not appear, the accused shall be discharged, otherwise court to hear the proofs and decide accordingly. 1868-'9, c. 178, sub chap. 2, s. 11.

If the complainant does not appear, the party recognized shall be discharged, unless good cause be shown to the contrary. If the respective parties appear, the court shall hear their allegations and proofs, and may either discharge the recognizance taken, or they may require a new recognizance, as the circumstances of the case require, for such time as may appear necessary, not exceeding one year.

Sec. 550 (1227). Recognizance, when deemed broken. 1868-'9, c. 178, sub chap. 2, s. 12.

No recognizance taken under this chapter shall be deemed to be broken except in the case provided for in the next two preceding sections, unless the principal in such recognizance be convicted of some offence amounting in judgment of law to a breach of such recognizance.

Sec. 551 (1228). Where there is evidence of breach, court shall order recognizance prosecuted. 1868-'9, c. 178, sub chap. 2, s. 13.

Whenever evidence of such conviction shall be produced in the court in which the recognizance is filed, it shall be the duty of such court to order the recognizance to be prosecuted, and the solicitor shall cause the proper proceedings to be thereupon taken.

Sec. 552 (3467). Bond in criminal cases returned to court, and deemed a recognizance. R. C., c. 87, s. 12.

Every bond taken of any person confined for an offence, or otherwise than on process issuing in a civil case, shall be returned to the court by whose order or process such person is confined, or which may be entitled to cognizance of the matter, and shall be of the force and effect of a recognizance; and on breach thereof shall be forfeited, and shall be collected as a forfeiture, in the name and for the use of the state, and applied as other forfeited recognizances.

REFUSING TO ASSIST OFFICER.

See also ARREST.

In an indictment for refusing to assist an officer in securing a prisoner it is not sufficient to allege that this was an arrest by lawful authority; the authority to arrest must be set out in the indictment. Shaw, 25 (3 Ire.), 20.

REGISTRATION OF VOTERS.

Sec. 553 (2709). Penalty for fraudulent registration or voting.

Any person who shall with intent to commit a fraud, register or vote at more than one box or more than one time, or who shall

induce another to do so, or any person who shall illegally vote at any election, shall be guilty of an infamous crime, imprisoned not less than six nor more than twelve months, or fined not less than one hundred nor more than five hundred dollars, at the discretion of the court; and any registrar of voters, or any clerk or copyist who shall make any entry or copy with intent to commit a fraud, shall be liable to the same penalty.

THE UNCOMMUNICATED OPINION OF THE JUDGES IN FAVOR OF DEFENDANT'S RIGHT TO VOTE NO EXCUSE.—Where a person votes in a county in which he does not live, he cannot excuse himself on the ground that other persons advised him that such vote was lawful and that the judges of the election discussed the point and decided in his favor, when such discussion was not heard by him, and the discussion of the judges was neither officially declared nor communicated to him. Hart, 51 (6 Jones), 389.

IGNORANCE OF THE LAW NO EXCUSE.—A person who votes at an election without having resided in the township in which he casts his vote the requisite length of time next preceding the election, and who fails to disclose the fact of his non-residence for such time to the judges of election, is presumed to have voted *knowingly* and *fraudulently*, and the mere fact that he was advised by a respectable gentleman, or even by an attorney, that he had a right to vote will not excuse him, and such evidence is inadmissible. Boyett, 32 (10 Ired.), 336.

IGNORANCE OF A MATTER OF FACT AN EXCUSE.—If a person votes at a place where he is not entitled to vote through ignorance of a matter of fact, as where one living near the dividing line between two townships or wards, votes in the wrong place, honestly mistaking the line and believing that the true line puts him in the township in which he votes, he is not guilty, since there is not in such case the necessary criminal intent. Boyett, 32 (10 Ired.), 336.

IRREGULARITIES IN HOLDING ELECTION NO EXCUSE.—One who votes illegally at an election can not escape conviction on the ground that the election was held and conducted irregularly, since the invalidity of the election for irregularities can only be established in a direct proceeding and can not be shown collaterally. Cohoon, 34 (12 Ired.), 178.

REGISTRAR OF ELECTION REFUSING TO ALLOW A VOTER TO REGISTER.—A registrar of an election who refuses to allow a voter to register on the ground that the town charter, under which such registrar is acting, requires the payment of all taxes due the city as a qualification for voters, and that such voter has not paid his city taxes, is not criminally liable, though that part of the charter which requires the payment of city taxes as a qualification for voting may be unconstitutional, since nothing can be inferred against him for assuming that the charter is valid. Powers, 75—281.

WHEN OFFICERS INDICTABLE.—An officer who has to exercise his judgment or discretion is not liable *criminally* for any error which he commits, *provided he acts honestly*; but any officer, whether judicial or ministerial, who acts corruptly, is responsible both civilly and criminally, whether he acts under the law or without the law. Powers, 75—281.

Sec. 554 (2732). Illegal registration. 1876-'7, c. 275, s. 61.

Any person who shall cause or procure his name to be registered in more than one election ward or precinct, or shall cause or procure his name, or that of any other person, to be registered, know-

ing that he or the person whose name he has procured to be registered is not entitled to vote in the ward or election precinct wherein such registration is made, at the ensuing election to be held therein, or who shall falsely personate any registered voter, shall be guilty of a crime infamous by the laws of the state, and shall be punished for every offence by a fine not exceeding one thousand dollars, or imprisonment at hard labor for a term not exceeding two years, or both, in the discretion of the court.

Sec. 555 (2733). Persons having been convicted of an infamous crime may be challenged and required to answer; convicted person not allowed to vote unless restored to the rights of citizenship. 1876-'7, c. 275, s. 62.

If any person be challenged as being convicted of any crime which excludes him from the right of suffrage, he shall be required to answer any questions in relation to such alleged convictions, but his answer to such questions shall not be used against him in any criminal prosecution, but if any person so convicted shall vote at any election without having been restored to the rights of citizenship, he shall be guilty of an infamous crime, and punished by a fine not exceeding one thousand dollars, or imprisoned at hard labor not exceeding two years, or both.

Sec. 556 (2679). Persons who are not allowed to register or vote. Const., Art. VI, s. 1. 1871-'2, c. 185, s. 10. 1876-'7, c. 275, s. 10.

The following classes of persons shall not be allowed to register or vote in this state, to-wit: First, persons under twenty-one years of age; second, idiots and lunatics; third, persons who, upon conviction or confession in open court, shall have been adjudged guilty of felony or other crime infamous by the laws of this state, committed after the first day of January, in the year of our Lord one thousand eight hundred and seventy-seven, unless they shall have been legally restored to the rights of citizenship.

Sec. 557 (2680). Qualification of electors; residence of electors; fraudulent registration or voting punishable by fine and imprisonment. Const., Art. VI, s. 1. 1871-'2, c. 185, s. 10. 1876-'7, c. 275, s. 11.

Subject to the foregoing exceptions, every male person born in the United States, and every male person who has been naturalized, twenty-one years of age, who shall have resided in the state twelve months next preceding the election, and ninety days in the county in which he offers to vote, shall be a qualified elector in the precinct or township in which he resides; and all electors shall register and vote in the election precinct of their residence. The residence of a married man shall be where his family resides, and that of a single man where he boards and sleeps; and should any single

man board in one ward or precinct and sleep in another, then his residence shall be in the ward or precinct in which he sleeps, and he shall not register or vote in any other ward or precinct. But no elector shall be allowed to register in any ward or precinct to which he shall have removed for the mere purpose of being a voter therein, nor unless his residence therein is actual and *bona fide*. And it shall be the duty of the registrar or judge of election, when requested by any bystander, to swear any person offering to register or vote, as to his residence, and to have placed in writing opposite his name the word "sworn;" and any person knowingly and fraudulently registering or voting at any other place than that of his *bona fide* residence shall be guilty of a crime infamous by the laws of this state, and punished by a fine not exceeding one thousand dollars, or imprisoned at hard labor not exceeding two years, or both, in the discretion of the court.

DISQUALIFICATION OF ELECTORS—PERJURY.—The oath prescribed for electors in the above section omits some of the essential requisites to voting contained in the constitution, and is confined to those indispensable qualifications set out in Const., art. 6, sec. 1. The oath does not extend to disqualification incident upon conviction for crime, and, therefore, an indictment for perjury which alleges that defendant swore, at the time he registered as a voter, that he was a duly qualified voter, whereas, at the time of taking such oath, the defendant was not a duly qualified voter, he having been convicted of larceny and the judgment suspended, can not be sustained. Houston, 103—383.

Before a person can be convicted of perjury in swearing that he was a qualified voter when in fact he had been convicted of a felony, he must take the oath prescribed for challenged voters in section 2684 of The Code. It is only under the latter section that he swears that he has not lost the right to vote by any provision of the constitution or laws which takes the right from him. Houston, 103—383.

CONVICTION MUST BE FOLLOWED BY A JUDGMENT.—Under Const. N. C., art. 6, sec. 1, providing that "no person who, upon conviction or confession in open court, shall be *adjudged guilty* of felony, or any other crime infamous by the laws of this state, and hereafter committed, shall be deemed an elector," a person does not forfeit his rights as an elector by a mere verdict of guilty, or a confession; but in order that such forfeiture shall attach, such verdict or confession must be followed by a judgment of the court against the accused. Where one is convicted of a felony, but the judgment is suspended, he does not forfeit his rights as an elector. Houston, 103—383.

THE DISQUALIFICATION NOT A PART OF THE JUDGMENT OF THE COURT.—The disqualification for office and the loss of the right of suffrage, imposed by article six of the constitution, upon persons convicted of infamous offences, constitute no part of the judgment of the court, but are the mere consequences of such judgment. The sentence of the court is just such as the law prescribed before the adoption of that article. Jones, 82—685.

RELIGIOUS CONGREGATION.

Sec. 558 (3672). Penalty for intoxication or disorder during worship. R. C., c. 97, s. 8. 1807, c. 729, s. 2.

If any person shall be intoxicated, or shall quarrel, fight or be guilty of any other disorderly behavior at a church or other place appointed for divine worship, during the time the people shall be there assembled for such worship, he shall, for each offence, forfeit and pay twenty dollars.

INDICTMENT.—An indictment for disturbing a “religious assembly commonly called a quarterly meeting conference,” without charging that the assembly had met for divine worship, or using words of like import, can not be supported. Fisher, 25 (3 Ired.), 111.

VARIANCE.—An indictment charging defendant with going into a religious congregation engaged in actual service, and then and there exhibiting himself drunk, and by cursing and swearing with a loud voice, and by making indecent gestures and grimaces, disturbing them, is not sustained by proving that he disturbed them by striking the meeting-house on the outside with a stick, since though, in this case, the noise constituted the offence, and the indictment might have so charged and stopped, yet having charged *how* the noise was made and *where*, the state must prove it as laid. Sherrill, 46 (1 Jones), 508.

An indictment for disturbing a congregation “then and there assembled for the purpose aforesaid, and *actually engaged in divine worship*,” is not supported by proof that defendant engaged in a quarrel near the church door, but that up to the end of the disturbance the people had not all assembled in the church, some being in the house and others outside, and that divine worship had not commenced. Bryson, 82—576.

COMMON LAW.—Disturbing religious worship is indictable at common law. Jasper, 15 (4 Dev.), 323.

EVIDENCE.—There were two parties of religious worshipers, each claiming the same church building, and each of whom posted up notices forbidding the other to enter on the premises. On a certain Sabbath the defendant and his associates took possession, and when the leader of the other party and his associates came up, the defendant, and others aiding him, forbade and prevented their entering the church or worshipping there, and were indicted for disturbing religious worship: *Held*, that it was error to exclude evidence offered by defendant to show the *bona fides* of his conduct in taking possession of the church. Jacobs, 103—397.

Defendant, after the voluntary singing of a hymn by the congregation, rose up in the church and began to speak about his expulsion from the church, which had occurred a short time previously. When directed to stop by the minister he declared he would be heard, and persisted in speaking until he was removed from the house, but he again entered and resumed speaking, against the repeated remonstrances of the minister, and by his conduct and voice broke up the meeting: *Held*, that a verdict of guilty was proper. Ramsay, 78—448.

SINGING IN CHURCH.—The disturbance of a religious congregation by singing, when the singer does not intend to so disturb it, but is conscientiously taking part in the religious services, is not indictable. Linkhaw, 69—214.

HOUSES OTHER THAN CHURCHES.—An academy in which divine services are held at stated intervals under authority contained in the deed prescribing that the building was to be used "for the purpose of an academy and for the convenience of preaching, which is not to be prohibited on all suitable occasions," is not a church within the meaning of an act prohibiting the sale of liquor within a certain distance of any church in the county. *Midgett*, 85—538.

An indictment will lie for disturbing religious services conducted at a private house. *Swink*, 20 (D. & B.), 358.

DISTURBANCE CAUSED BY THIRD PERSON.—Defendant and another engaged in a fight about thirty-five yards from a church in which a congregation was engaged in religious worship. One who was present at the fight ran to the church and called out, "They are fighting at the fire," whereby the congregation was disturbed. The jury found that the congregation would not have been disturbed but for the fact of their attention being called to the fight in the manner described: *Held*, that defendant was not guilty of disturbing a religious congregation. *Kirby*, 108—772.

Sec. 559 (3669). Penalty for stopping way to places of worship, springs, etc. R. C., c. 97, s. 5. 1785, c. 241.

If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall, for every such offence, forfeit and pay twenty dollars.

Sec. 560 (3670). Stud-horses, jacks, curiosities, not to be exhibited within half-a-mile of congregation; exception as to towns, etc. R. C., c. 97, s. 6. 1809, c. 779, s. 1.

If any person shall bring within half-a-mile of any place where the people are assembled for divine worship, and stop for exhibition any stud-horse or jack, or shall bring within that distance any natural or artificial curiosities, and there exhibit them, he shall forfeit and pay to anyone who will sue therefor, the sum of twenty dollars, and shall be guilty of a misdemeanor: *Provided*, that nothing therein shall be construed to prohibit such exhibitions at any time, if made within the limits of any incorporated town, or without such limits, if made before the hour of ten o'clock in the forenoon, or after three o'clock in the afternoon.

Sec. 561 (3671). Sale of liquor and goods within a mile forbidden; exception; penalty. R. C., c. 34, s. 109. R. C., c. 97, s. 7. 1800, c. 564, ss. 1, 2. 1808, c. 761, s. 1. 1809, c. 779, s. 2.

No person, licensed keepers of taverns and retailers excepted (and they only when they shall sell at their taverns or shops), during the progress of religious exercises, at any place where divine service may then be celebrated, shall sell within one mile of such place, any spirituous liquor, or any liquor of which spirituous liquors shall be the chief ingredient. Nor shall any person, the keepers of licensed stores only excepted, during such time, and

within the distance of such place, be engaged in the occupation of selling or offering to sell any article of traffic, prepared food and provender only excepted. And if any person shall offend against this or the preceding section, he shall forfeit and pay, to anyone who will sue therefor, twenty dollars, and shall be guilty of a misdemeanor.

REMOVAL OF CAUSES.

REMOVAL TO FEDERAL COURT—The act of congress, U. S. Rev. St., sec. 643, authorizing the removal of criminal cases from a state court to the United States courts is constitutional. Hoskins, 77—530.

Where defendant, indicted for assault and battery, makes affidavit that he was a revenue officer of the United States, and that the alleged offence was committed under color of his office, and prays the removal of his case to the United States circuit court, it is proper to stay further proceedings in the state court. Hoskins, 77—530.

Where it appears from the affidavit of a person of color, charged with a capital offence, that he can not have the full and equal benefit of the laws and proceedings for the security of person and property as is enjoyed by white citizens, and that his rights can not be enforced in the state courts, the state courts will suspend further proceedings in the cause until certified of the action of the circuit court of the United States under the act of congress, March 3, 1863. Dunlap, 65—491.

Statutes depriving courts of jurisdiction once attached are strictly construed, and every requirement of such statute must be met before the court will yield its jurisdiction. Sullivan, 110—513.

The jurisdiction of state courts over the persons and subject-matter enumerated in the act of congress (Rev. St., sec. 643) does not cease upon the filing of the petition for removal in the circuit court; that result follows only when the petition setting forth the facts required by the statute has been duly filed, and the appropriate writ has been issued and made known to the state court. Sullivan, 110—513.

The filing of the petition for removal and issuing of the writ are judicial acts which can not, in the absence of statutory authority, be performed by a deputy clerk. Sullivan, 110—513.

Sec. 562 (196). Judges authorized to remove causes from one county to another. 1879, c. 45. 1899, c. 104

In all civil and criminal actions in the superior and criminal courts, in which it shall be suggested on oath, or by affirmation, on behalf of the state, or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial can not be obtained in the county in which the action shall be pending, the judge shall be authorized to order a copy of the record of said action to be removed to some adjacent county for trial, if he shall be of the

opinion that a fair trial can not be had in said county, after hearing all the testimony which may be offered on either side by affidavits.

REMOVAL AS TO ONE INDICTMENT WITHOUT THE OTHER.—Where two or more are indicted, the trial of one may be removed to another county without removing the trial of the others. *Martin* 24 (2 Ired.), 101.

A certified copy of the record was sent to the superior court of a county in which there was a criminal court "to the end that it may be there docketed and *from there* certified to the criminal court," the case having been ordered removed to the criminal court for trial, and the clerk of the superior court of the county to which the case was removed docketed it, and then transmitted the same certified copy to the clerk of the criminal court with a certificate attached that it had been forwarded to him: *Held*, that the criminal court had jurisdiction to try the case, as so much of the order of removal as required the docketing of the case in the superior court was surplusage. *Weddington*, 103—364.

On removal of a case from one county to another, the prisoner has no right to have the whole transcript of the record read to the jury, but to read the indictment and so much of the record as shows the jurisdiction of the court is sufficient. *Carland*, 90—668.

Where two or more are indicted, the trial of one may be removed to another county without removing the trial of the others. *Martin*, 24 (2 Ired.), 101.

DISCRETION—NO REVIEW.—The granting or refusal of a motion to remove, however strong the affidavit, and whether there be counter affidavits or not, is not reviewable. *Smarr*, 121—669.

ARREST OF JUDGMENT.—Where the affidavit for removal states that the state could not get justice in either of two counties, and the case is removed to another county, there is no ground for arrest of judgment. *Anderson*, 92—732.

REASONS FOR AFFIANT'S BELIEF.—An affidavit for a removal must set forth the reasons for affiant's belief that he can not get justice in the county from which the cause is asked to be removed. Overruled in *State v. Seaborn*, 15 (4 Dev.), 305. *Twitty*, 9 (2 Hawks), 248.

An affidavit for the removal of a cause, which sets forth the *facts* on which the affiant grounds his belief that he can not get justice in the county in which the action is brought is sufficient, without stating affiant's *belief* that he can not get justice in that county. Overruling *State v. Twitty*, 9 (2 Hawks), 248. *Seaborn*, 15 (4 Dev.), 305.

THE REFUSAL OF THE JUDGE TO REMOVE, A MATTER OF DISCRETION.—Whether or not an application to remove a cause shall be granted rests in the sound discretion of the trial judge, and ordinarily his action is not reviewable, though under some circumstances, as if, for instance, he should refuse on account of a supposed want of power, his action might be reviewed. *Hall*, 73—134.

COURT THE SOLE JUDGE AS TO PROPER VERIFICATION.—The court to which a cause is removed is the sole judge as to whether the transcript is properly verified by the seal of the court from which it has been sent, and his action is not reviewable. *Lambert*, 93—618.

ORDER SUFFICIENT.—An order for removal directing that "the *trial* of the prosecution shall be removed" is sufficient without directing further that "a *copy of the record* of said action" be removed, since it is in fact the place of *trial* that is changed and the other part of the statute author-

izing the trial to proceed on a transcript instead of the original record is merely directory. *Shepherd*, 30 (8 Ired.), 195.

CAUSE MUST BE AT ISSUE BEFORE REMOVAL.—Before an order can be made for the removal of a cause, the defendant must plead to the indictment in order that there may be an issue made up. *Swepton*, 81—571.

PLEA MAY BE ORE TENUS.—Where the defendant, *ore tenus*, pleads “not guilty” and “former acquittal,” the cause is at issue on both pleas and ready for instant trial, a general application being implied under our practice, and the cause may then be removed. *Swepton*, 81—571.

Sec. 563 (197). What requisite to authorize such removal. 1879, c. 45. 1899, c. 104.

No action, whether civil or criminal, shall be so removed, unless the affidavit shall set forth particularly and in detail the ground of the application. And it shall be competent for the other side to controvert the allegations of fact in said application, and to offer counter-affidavits to that end. And the judge shall order the removal of any such action if he shall be satisfied, after thorough examination of the evidence as aforesaid, that the ends of justice demand it.

Sec. 564 (198). On removal of an action, what to be sent with transcript.

When a cause shall be directed to be removed, the clerk shall transmit to the court to which the same is removed, a transcript of the record of the case, with the prosecution bond, bail-bond, and the depositions, and all other written evidences filed therein.

CERTIORARI TO COURT FROM WHICH CASE REMOVED.—Where there is a defect in the record of the cause as it stood in the county from which the case was removed, the proper course is to move an amendment in that county, and upon suggestion of a diminution of the record, to have the amended record brought up by *certiorari* to the court in which the cause stands for trial. *Swepton*, 81—571.

Where a cause is removed from one superior court to another, the latter has the right to issue a writ of *certiorari* to the former, directing a more perfect transcript to be certified. *Collins*, 14 (3 Dev.), 117.

RULING OF COURT NOT REVIEWABLE.—The refusal of the trial judge to remove a case can not be reviewed in the supreme court. *Duncan*, 28 (6 Ired.), 98.

SECOND TRANSCRIPT WITHOUT CERTIORARI.—Where the first transcript sent on the removal of a case is defective, the clerk of the superior court may send another curing the defect of his own motion and without a *certiorari*. *Anderson*, 92—732.

TRANSCRIPT SENT TO SUPERIOR COURT TO BE CERTIFIED TO CRIMINAL COURT OF SAME COUNTY.—A certified copy of the record was sent to the superior court of a county in which there was a criminal court “to the end that it may be there docketed and from there certified to the criminal court,” the case having been ordered removed to the criminal court for trial; and the clerk of the superior court of the county to which the case was removed docketed it, and then transmitted the same certified copy to the clerk of the criminal court with a certificate attached that it had been forwarded to him: *Held*, that the criminal court had jurisdiction to try the

case, as so much of the order of removal as required the docketing of the case in the superior court was surplusage. Weddington, 103—364.

PRACTICE WHEN TRANSCRIPT INSUFFICIENT.—Where the transcript of the order of removal of a prosecution to another county is insufficient, the proper course, on a motion to quash for such reason, is to have a writ of *certiorari* issued to the clerk of the county from which the case was removed for a full and true transcript; or in case of a motion to arrest the judgment on such ground, to suspend judgment until such true transcript can be had. But in such case the supreme court may, on appeal, have such record sent up by *certiorari* to the county whence the case was removed. Surles, 117—720.

It is no ground for arrest of judgment that the original indictment was sent as part of the transcript on removal instead of a copy. Johnson, 6 (2 Murph.), 201.

The superior court of a county to which the case is removed may issue a *certiorari* directing a more perfect transcript to be certified. Collins, 14 (3 Dev.), 117.

Where after conviction a motion in arrest of judgment is made because the transcript is on two detached sheets, the judge may suspend judgment and order a *certiorari*, and if upon return of the *certiorari* at next term it appears that the first transcript was full and complete, the judgment may be pronounced. Scott, 19 (2 D. & B.), 35.

AMENDMENT OF TRANSCRIPT.—The courts have authority to amend a transcript in order to make it conform to original record. Buckley, 72—358.

It is not sufficient ground for arrest of judgment that the court permitted the transcript to be amended from the original records by the clerk of the county where the indictment was found, so as to show that the same was returned in open court. Underwood, 77—502.

PRACTICE IN MAKING AMENDMENT.—Where there is a defect in the record as it stood in the county from which it was removed, the proper course is to move an amendment in that county, and upon suggestion of a diminution of the record to have the amended record brought up by *certiorari* to the court in which the cause stands for trial. Swepson, 81—571.

DEFECTS IN TRANSCRIPT MUST BE SPECIFIED.—The overruling of an objection to a transcript of the record, sent from the county from which a case has been removed, can not be assigned as error when the objector refuses to specify in what respects the transcript is defective; certainly where there is no contention that the record is not sufficient to show jurisdiction. Hassell, 119—852.

REMOVAL OF CROP.

See LANDLORD AND TENANT.

REQUISITION.

See EXTRADITION—FUGITIVES.

RESCUE.

See HOMICIDE, OFFICERS—ASSAULT AND BATTERY.

RESISTING OFFICER.

See ARREST—HOMICIDE—ASSAULT AND BATTERY.

An indictment which describes the officer as "a duly constituted officer of the police of the town" and also alleges that he was "discharging a duty of his office" is good. Pickett, 118—1231.

Where the bill charged that the officer resisted was a *police officer* in the due execution of his office, and the proof was that the officer was the *chief marshal* of the town, and the town ordinance authorized the *constable* to make arrests, the variance was immaterial. Pickett, 118—1231.

RETAILING.

See LIQUOR SELLING—LOCAL OPTION.

RIOT.

INDICTMENT.—Where the indictment charges a riot in pulling down and destroying a dwelling-house alleged to be in the possession of a woman, and it appears on trial that the woman is married, though her husband was not living with her at the time the offence was committed, the charge is not supported by the proof, since the charge is not for a general riot, but a riot committed in destroying a particular dwelling-house, and the indictment should state properly whose house it was. Martin, 7 (3 Murph.), 533.

An indictment which alleges that defendants did follow and pursue the prosecutor with sticks and stones "for the purpose of assaulting and beating him," to the terror of the prosecutor and the good citizens of the state then and there residing, sufficiently charges a riot, since it is not necessary to constitute a riot that the facts charged should amount to a distinct and substantive indictable offence, but it is sufficient that the

facts charged would constitute an attempt to commit an act of violence, which if completed would be an indictable offence. York, 70—66.

An indictment for a riot must charge facts which show a breach of the peace or acts directly tending to it, and not a mere civil trespass; hence an indictment for riotously assembling in front of the prosecutor's house and making a great noise and disturbance, which fails to allege that the prosecutor or any member of his family was in the house or present at the time, is fatally defective, and the defect is not supplied by a conclusion that such acts were "to the great damage and terror" of the prosecutor and his wife, since a conclusion can not make an averment. Hathcock, 29 (7 Ired.), 52.

In an indictment for a riot it is necessary to aver and prove a previous unlawful assembly, and, therefore, if the assembly were lawful, the subsequent illegal conduct of the persons so assembled will not make them rioters. Stalcup, 23 (1 Ired.), 30.

VARIANCE.—An indictment for a riot is not supported by proof that defendants assembled in consequence of having been summoned by an officer to aid him in executing a state's warrant issued against the prosecutor, and that the riotous acts were committed after so assembling, since the indictment must always aver, and the evidence prove, that the defendants *unlawfully assembled*. Stalcup, 23 (1 Ired.), 30.

An indictment charging a riot and forcible trespass to the land of one, is not supported by proof that the land belonged to him, but was then in possession of another as his tenant. Wilson, 23 (1 Ired.), 32.

EVIDENCE.—Parol evidence of the prosecutor's possession is sufficient. Wilson, 23 (1 Ired.), 32.

PROCESSION—CELEBRATION.—"Defendant and others assembled in a certain town to celebrate the emancipation proclamation, and with two drums and fifes marched up and down the streets for two or three hours. Some were mounted, but being told to dismount they got down and hitched their horses. When told by the mayor to desist they at first refused, but being notified by the constable to stop, the defendant Hughes, with the procession, beating the drum, went to the mayor's office to make up a case to be tried before a magistrate to test the mayor's right to forbid the procession. There were no arms in the crowd except sabres used by the officers; no violence in word or deed was offered to any citizen; some of the citizens were disturbed by the noise of the drums, and some of the persons were drinking; the streets were obstructed from time to time during the interval, and one horse hitched in a lot broke loose": *Held*, that defendants were not guilty of creating a riot, since the assembly was not unlawful. Hughes, 72—25.

ROADS.

Sec. 565 (2014). What shall be public roads and ferries; their supervision given to justices of the peace; how roads and ferries discontinued. R. C., c. 101. 1868, c. 20. 1868-'9, c. 185. 1879, c. 82.

All roads and ferries that have been laid out or appointed by virtue of any act of assembly, or any order of court, are hereby

declared to be public roads and ferries; and the justices of the peace in each township shall have the supervision and control of the public roads in their respective townships. They shall, with respect to this work, constitute and be styled the "Board of Supervisors of Public Roads" of such township, and under that name, for the purpose aforesaid, they are hereby incorporated the "Board of Supervisors of Public Roads," and the board of county commissioners, as hereafter in this chapter set forth, shall have full power and authority within their respective counties to appoint and settle ferries; to order the laying out of public roads where necessary; to appoint where bridges shall be made; to discontinue such roads and ferries as shall be found useless; and to alter roads so as to make them more useful: *Provided*, that it shall be the duty of the county commissioners to have all roads laid out and constructed that have been heretofore or may hereafter be ordered as public roads, before the duties of the supervisors as to such roads shall obtain, and that the county commissioners are hereby vested with all the powers that the supervisors now have for having such roads constructed and received.

Sec. 566 (2017). Who liable to work on roads; time compelled to work. 1879, c. 82, s. 4. 1880, c. 30, s. 2.

All able-bodied male persons between the ages of eighteen years and forty-five years shall be required under the provisions of this chapter to work on the public roads, except the members of the board of supervisors of public roads, but no person shall be compelled to work more than six days in any year, except in case of damage resulting from a storm: *Provided*, that ten days instead of six days be the limit as to the counties west of the Blue Ridge.

Sec. 567 (2058). License to erect gates across highways, how obtained; misdemeanor to leave open or injure gates. R. C., c. 101, s. 39. 1834, c. 16, ss. 2, 3, 4. 1885, c. 45.

Any person desiring to erect a gate across a public road may file his petition before the board of supervisors of the township where the road lies; whereupon, publication shall be made at the court-house until the next succeeding meeting, of such application, specifying the road, the place for the gate and the name of the petitioner; and all persons interested in the convenient traveling or transportation on such road, shall have leave to appear and defend, demur, or plead to said petition; and if, at that meeting, it shall appear that such publication has been made, the supervisors may, at their discretion, authorize the petitioner, at his cost, to erect a gate as prayed for. And if any person shall leave open,

break down or otherwise injure such gates, he shall forfeit and pay for every such offence ten dollars to the person erecting the same or his assigns of the land, and if the offence shall be maliciously done, he shall be guilty of a misdemeanor.

GATE ACROSS ROAD.—The use of a gate across a public road for ten years will not authorize the presumption of a grant for its erection. *Marble*, 26 (4 Ired.), 318.

An indictment for breaking down a gate across a cartway described it as running through the land of H, beginning near the house of C, in B township, and running in an eastern direction through the lands of said H for the distance of about "one-half mile," and alleged that the cartway was "laid off by the authority of a jury regularly constituted by the board of supervisors in and for said B township": *Hela*, (1) that the legality of the establishment of said cartway was sufficiently averred in the bill; (2) that the bill sufficiently locates the cartway, although it does not state its eastern terminus or whether it runs to a public road. *Combs*, 120—607.

MUST BE ESTABLISHED ACCORDING TO LAW.—The failure to establish a cartway according to law is a matter of defence to be pleaded in the trial of an indictment for breaking down a gate across it. *Combs*, 120—607.

Sec. 568 (1054). Highways and public roads, overseer of, neglecting his duty. R. C., c. 34, s. 39. 1786, c. 256, s. 4. 1889, c. 504.

Every overseer of a road, who shall wilfully neglect any of the duties imposed on him by law, shall be guilty of a misdemeanor, and the punishment for every such offence shall not exceed a fine of fifty dollars or imprisonment for thirty days.

INDICTMENT.—An indictment under a private statute against the president and directors of a turnpike company for failure to keep the road in repair, is fatally defective if it fail to aver the particular duty or duties alleged to have been omitted. *McDowell*, 84—798.

An indictment under this section which fails to allege that defendant "wilfully neglected" his duty, is fatally defective, and can not be upheld under sec. 2022. *Miller*, 100—543.

BAD WEATHER AS AN EXCUSE.—If the weather is so bad as to prevent an overseer from working on the road, or to render unavailing any work he might do, he ought to be excused. *Small*, 33 (11 Ired.), 571.

APPOINTMENT OF OVERSEER NOT SUFFICIENT.—Where a charter has been granted for a turnpike road and the road opened, the county court has no right to convert it into a public road unless the charter has been duly surrendered, or unless from a *non-user* for twenty years a dedication to the public may be presumed; and even then the road can only be made a public road in the manner prescribed by the legislature; the mere appointment of an overseer is not sufficient for that purpose. *Nash, J., dissenting. Johnson*, 33 (11 Ired.), 647.

EVIDENCE.—An order issued by the board of township trustees appointing a person overseer is proper evidence of such appointment. *Cable*, 70—62.

On indictment of an overseer for failure to keep his road in repair, parol evidence that he professed to be overseer and acted as such is competent, and it is not necessary to show his appointment by the record. *Long*, 76—254.

OVERSEER FAILING TO KEEP HIS ROAD IN REPAIR.—An indictment against

a road overseer for failure to keep his road in proper repair, which does not charge that he "wilfully neglected" to repair his road, can not be supported under this section. The clause providing that "If any overseer shall fail to discharge any of the duties imposed by this chapter he shall be guilty of a misdemeanor," has reference to the discharge by overseers of the particular and numerous duties prescribed in that chapter of The Code, and such chaptr does not prescribe particularly that overseers shall keep their roads in proper repair. Miller, 100—543.

HOW OVERSEER RELIEVED OF HIS DUTY.—An overseer can not free himself from his duties by simply surrendering his order of appointment to the clerk of the board of township trustees. Long, 81—563.

An overseer is not relieved at the end of a year except by order of the board and on showing that his road is in the condition required by law. He continues to be responsible until his successor is appointed. Long, 81—563.

SIGN-BOARDS.—An overseer is indictable for failure to put up sign-boards under section 2030 of The Code. Nicholson, 6 (2 Murph.), 135.

The overseer is indictable for failure to keep sign-boards as directed by the statute. Nicholson, 6 (2 Murph.), 135.

ASSUMING TO BE OVERSEER.—One who assumes to be overseer of a road and acts as such by summoning hands and superintending them is indictable for failure to keep the road in good order. Long, 81—563.

The fact that one professed to be the overseer and acted as such may be shown by parol, and the record of his appointment need not be shown. Long, 76—254.

OVERSEER MUST BE NOTIFIED OF HIS APPOINTMENT.—In an indictment against an overseer it is necessary to show that he has been served with a notice of his appointment ten days before the offence charged. Everett, 4 (2 Car.), 633 (436).

Sec. 569 (2019). When overseer to summon hands to work roads; notice; duty of persons summoned; proviso. 1879, c. 82, s. 5. 1880, c. 30, s. 3.

The overseer of the road shall, as often as the road shall require, subject to the limitation in the preceding section summon the hands of his section to work on the road, but the said hands shall not be required to work continuously for a longer time at any one time than two days, and at least fifteen days shall intervene between workings, except in case of special damage to the road, resulting from a storm. The notice shall be at least three days before the day named for the work, and shall state the hour and the place for the meeting of the hands, and what implement the hand shall bring with him. Every person liable to work on the road who has been so summoned shall appear at the time and place named, and with the implement directed, and shall work on the road under the direction of the overseer until discharged by him: *Provided*, that no hand shall be required to work for a less time than seven hours nor a longer time than ten hours in any one day. Any person summoned as aforesaid who shall, by twelve o'clock of the day preceding the one appointed for work on the

road, pay to the overseer the sum of one dollar shall be relieved from working on the road for one day. The money thus collected by the overseer shall be by him applied on the working and repairing of the road: *Provided further*, that any person who shall furnish one able-bodied hand as a substitute, with the implement directed, shall be held to have complied with this chapter.

Sec. 570 (2020). Failure to attend and work misdemeanor; fine and costs. R. C., c. 101, s. 11. 1817, c. 935, s. 2. 1825, c. 1287. 1879, c. 82, s. 6. 1885, c. 392.

Any person liable to work on the road who shall fail to attend and work as hereinbefore provided when summoned so to do, unless he shall have paid the one dollar as aforesaid, shall be guilty of a misdemeanor, and fined not less than two dollars nor more than five dollars, or imprisoned not exceeding five days, and if any defendant shall be unable to discharge the judgment and costs that may be recovered against him, the costs shall be paid by the county.

WHO LIABLE TO WORK.—Section hands working on our railroads at regular wages are not thereby excused from working our public roads. Cauble, 70—62.

A road hand can not excuse himself from aiding to repair a bridge over a ditch across the road on the ground that it is the duty of the person who cut the ditch to make a bridge over it and keep it in repair. James, 75—393.

WHO LIABLE TO WORK.—A man who pursues a vocation in this state for an indefinite period is liable to road duty although he is a citizen of another state, to which he intends to return when he finishes his present employment. Johnston, 118—1188.

The fact that defendant had no occasion to use the road to which he was assigned to duty is no defence. Gillikin, 114—832.

ASSIGNMENT OF HANDS.—The assignment of one liable to road duty to any particular road rests with the supervisors of the township. Gillikin, 114—832.

EXEMPTION FROM WORK.—Section 25, chapter 147, acts of 1852, which exempts the officers, servants and employees of the Fayetteville & Western R. R. Co., (now the C. F. & Y. V. Co.), incorporated thereby, from working on the public roads, is constitutional. Womble, 112—862.

Such exemption being in a private act is not repealed by section 2017 of The Code, since by section 3873 of The Code it is provided that "no act of a private or local nature shall be construed to be repealed by any section of this Code." *Ibid*.

JUSTICES NOT INDICTABLE.—Justices of the peace are not indictable for failure to keep the public roads in repair. This is the duty of the overseer. Britt, 118—1255.

ROAD MUST BE ACCEPTED.—The owner, by executing a deed to the public conveying the right of way to a highway, can not compel the authorities to assume the burden of repairing it unless it is accepted. Fisher, 117—733.

WARRANT.—A warrant for failure to work the roads which fails to allege that defendant had been duly assigned and was liable to work that par-

ticular road, and had been properly summoned, is fatally defective. Smith, 98—747.

Where the warrant simply charges that defendant "wilfully refused to attend and work on the public road after being lawfully warned," without negating the payment of one dollar, the judgment must be arrested. Neal, 109—859.

A warrant for failure to work a public road is fatally defective if it fails to conclude "against the form of the statute." Luther, 77—492.

A warrant for failure to work the road is fatally defective when it fails to state in what county the offence was committed, that the person summoning defendant was the overseer, that defendant was liable to work on the public road and had been assigned to that one, and that does not negative the payment of one dollar in lieu of services. Pool, 106—698.

CORPORATIONS—TURNPIKE COMPANY.—A plea of not guilty to an indictment against a corporation, is an admission of its corporate existence by the name specified. W. N. C. R. R. Co., 95—602.

The existence of a corporation may be shown by proof that it has officers, exercises corporate functions, and holds itself out to the world as such. *Ib.*

The officers of a duly incorporated turnpike company can not relieve themselves of the duties and liabilities to the public by an attempted surrender of their franchises to the board of county commissioners. Such surrender must be made to the state in some authorized way, nor will an abandonment by the corporation of its franchises work a discontinuance of the highway. *Ib.*

Sec. 571 (1717). No railroad, plank road, etc., to be established, but by law; penalty and misdemeanor therefor. R. C., c. 61, s. 37. 1874-'5, c. 83.

If any person or corporation, not being expressly authorized thereto, shall make or establish any canal, turnpike, tramroad, railroad or plank road, with the intent that the same shall be used to transport passengers other than such persons, or the members of such corporation; or to transport any productions, fabrics or manufactures other than their own, the person or corporation so offending, and using the same for any such purpose, shall forfeit and pay fifty dollars for every person and article of produce so transported; and shall, moreover, be guilty of a misdemeanor, they and all persons aiding therein, and shall be indicted therefor in the superior or criminal court.

Sec. 572 (2021). Overseers to report to board of supervisors; report to be verified; warrant to issue against road hand failing to perform duty. 1879, c. 82, s. 7. 1880, c. 30, s. 4.

Every overseer shall at each and every meeting of the board of supervisors of his township make report to them of the present condition of his road, of the number of days worked on his section since last meeting, of the number of hands who attended and worked each day, of the number and names of hands who failed to attend and work; whether or not they were legally summoned, and

whether or not they paid the one dollar as provided. The said overseer shall before some person authorized to administer an oath, make written affidavit that the report is true and correct. Upon this report sworn to as aforesaid, if it shall appear that any of the hands, after being legally summoned, have failed to attend and work on said road, and that they did not pay the one dollar, then it shall be the duty of the said supervisors, or any one of them, to issue a warrant for the arrest of any such hand, and shall put him upon trial for the offence: *Provided*, that nothing herein contained shall prevent the overseer of the road from prosecuting at any time after the offence has been committed, any hand for failure to work on the road, and such cases of prosecution shall be stated in his report to the board of supervisors, that they may not prefer another prosecution for the same offence.

Sec. 573 (2065). Obstruction of road, etc., a misdemeanor. 1872-'3, c. 189, s. 6. 1883, c. 383.

If any person shall wilfully alter, change or obstruct any highway, cartway, mill road or road leading to and from any church or other place of public worship, whether the right-of-way thereto be secured in the manner herein provided for or by purchase, donation or otherwise, such person shall be guilty of a misdemeanor, and fined or imprisoned, or both.

Any person who shall hinder or in any manner interfere with the making of any road or cartway laid off according to this chapter shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, at the discretion of the court.

INDICTMENT.—An indictment for obstructing "a certain public road and common highway" in the county, without specifying its particular location and terminal points more particularly, is fatally defective. *Crumpler*, 88—647.

Where an indictment against a railroad company charges that the company obstructed a public road "by placing in and across it certain plank," and the proof is that a dangerous hole in the crossing was occasioned by the slipping down of a plank used to raise the highway to a level with the railroad and was permitted to remain for a week or two, the variance is fatal. *Roanoke Railroad and Lumber Co.*, 109—860.

Where the indictment is for obstructing a "public highway" and the proof is that it was a "private cartway," the variance is fatal. *Purify*, 86—681.

PRESUMPTION OF GRANT FROM 20 YEARS' USER.—The owner of land over which a road runs, which has been used by the public for twenty years, is indictable for keeping up a fence across the road, though he did not originally erect it. *Hunter*, 27 (5 Ired.), 369.

Where the owner appropriates land for a public highway much less time than twenty years will suffice to make it a public road, for it is rather the intention of the owner than the length of the user which must determine the fact of dedication. *Marble*, 26 (4 Ired.), 318.

A road used for 60 years as a neighborhood road by persons going to and from church, and to mill during high water, but never established as a public road by legal proceedings, dedication or by user, accepted and recognized by competent authority, being kept up by voluntary labor on the part of those using it, and always under the control of the owners of the land over which it passes, is not a public highway. Gross, 119—868.

In the absence of a laying out by public authority, or actual dedication, it is essential, in order to constitute a church road which it is indictable to obstruct, not only that there must be a user for 20 years, but the road must have been worked and kept in order by public authority. Lucas, 124—124.

A road one mile long from ten to fifteen feet wide, leading from a public highway to a church and used by the people of the neighborhood for sixty years in going to and from church, and which connects with a county road leading to a mill and to a railroad station, but which has never been under the charge of an overseer, nor worked by the public, is not a public highway so as to subject one to indictment for obstructing it. McDaniel, 53 (8 Jones), 284.

A neighborhood road used by the general public for more than forty years, but never laid out according to legal proceedings, nor dedicated, nor worked by the public, is not a public highway the obstruction of which is indictable. Lucas, 124—804.

The mere use of a way for twenty years by persons generally, for vehicles or traveling on foot, does not constitute it a public *highway*, nor in the absence of evidence of condemnation or actual dedication does the fact that the public have exerted control over it for any less period than twenty years tend to show that an easement has been acquired by user, which raises the presumption of a grant. Wolf, 112—889.

HOW USER SHOWN.—The best evidence of user by the public of a highway is the fact that the proper authorities have appointed overseers and designated hands to work and assumed responsibility of keeping it in repair. Fisher, 117—733.

BURDEN ON STATE TO SHOW USER.—Where the public claims title to the easement in a highway by user, the burden is on the state to show title by adverse possession. Fisher, 117—733.

USER MUST BE ADVERSE.—The user of the road by the public must be adversary and of right, otherwise it is no crime to obstruct it. Stewart, 91—566.

PUBLIC SQUARE AND COMMON HIGHWAY.—An indictment which charges the obstruction of "a certain public square and common public highway there situate," giving the location and bounds of the square, and alleging that citizens of the state have long been accustomed to pass and repass across the same, and that defendant obstructed the same by "digging holes in, and erecting a line of posts in, upon and across said public square and common public highway," is not fatally defective for redundancy as charging a nuisance in obstructing a public common and an obstruction to a public highway, since a public square around a court-house is a public highway. Eastman, 109—785.

A public square used by the public as a means of access to the court-house and other public buildings, is substantially a public highway. Long, 94—896.

Where defendant and those under whom he claims has been in open and adverse possession of a part of a public square in a town, covered by his store, for twenty years prior to the indictment, such non-user extinguishes the public easement, and defendant can not be convicted. *Ib.*

DRIVING ON SIDEWALK.—One who wilfully drives his team along a sidewalk in a town, in violation of a town ordinance, can not excuse himself on the ground that the condition of the street was such at that place that his team could not pull the load without going on the sidewalk, and that there was no other possible way by which he could haul his load to the depot, especially when he knew of the condition of the street before he started, and there is no evidence that he was in danger of injury to body or health which could not be averted except by driving on the sidewalk. *Brown*, 109—802.

RAILROAD COMPANIES.—A railroad company is guilty of obstructing a public highway if it permits its engines and cars to remain thereon longer than is reasonably necessary for their safe-crossing. *W. N. C. R. R. Co.*, 95—602.

TITLE DOES NOT PASS—ONLY AN EASEMENT.—The laying off a highway over one's land does not deprive him of the freehold covered by the road. The public acquire only an easement, the right to pass and repass. *Howell*, 90—705.

REVOCATION OF OFFER TO DEDICATE.—Where the owner of land throws open a street to the use of the public by platting the ground of which it forms a part as an addition to the city, the fact that he refused, subsequently, to grant the city a right of way over the alleged street, after the city limits were extended, and that then the city proceeded to institute condemnation proceedings to acquire the same, sufficiently shows a revocation of the offer. *Fisher*, 117—733.

WHAT CONSTITUTES PUBLIC ROAD.—The board of commissioners ordered the construction of a public road, laid it out, appointed an overseer and assigned him hands to construct the road: *Held*, that such order constituted in the eye of the law a public road, and the hands are bound to aid in constructing and building the road, and for failure to do so were indictable. *Joyce*, 121—610.

There may be a public road *de facto*, and the only person who can question the right to such a road is the owner of the land. *Marble*, 26 (4 *Ire.*), 318.

A person who erects a fence across a public road attempted to be discontinued by a void proceeding is indictable. *Shuford*, 28 (6 *Ire.*), 162.

ACCEPTANCE.—Where an owner of land adjoining the city had offered to dedicate certain parts of it to the public as a highway, by platting the same as an addition to the city, an entry upon the street by a street railway company, under a license from the city, after the owner had recalled his offer, can not operate as an acceptance thereof by the city. *Fisher*, 117—733.

In order to acquire title to a street as laid out by the owner of land in an addition to a town, there must be an acceptance before the owner revokes the offer. *Fisher*, 117—733.

ORDER FINAL.—The judgment of a board of commissioners ordering the laying out of a public road is final until reversed, is binding upon all citizens of a county, and can not be collaterally attacked. *Joyce*, 121—610.

IRREGULARITIES IN ESTABLISHING ROAD.—A road laid off by commissioners under an order of a board of township trustees, who appoints an overseer of the same, is a public highway, and one indicted for obstructing such highway can not justify by showing irregularities in the proceeding to establish it. *Distinguishing State v. Spainhour*, 2 *Dev. & Bat.*, 547. *Davis*, 68—297.

On indictment for obstructing a public road, the fact that the petition for its establishment was addressed to the board of supervisors, though

the road was laid off by the board of commissioners, does not render the proceedings void. Smith, 100—550.

OVERSEER AND HANDS NOT NECESSARY.—A request for an instruction that to “constitute a public highway it must be a public charge, and must of necessity have an overseer and hands to work it,” is properly denied since such facts are simply the incidents of a public highway. Smith, 100—550.

PUBLIC ROAD DE FACTO SUFFICIENT.—A person may be convicted for obstructing a road which has been established by an erroneous judgment; it is enough that the way obstructed is a public road *de facto*. Spainhour, 19 (2 D. & B.), 547.

PAYMENT OF DAMAGES NOT NECESSARY BEFORE INDICTMENT.—When defendant is appointed overseer of a public road regularly established, but fails to open the road, but his successor does open it, and in so doing removes the fences which crosses it on defendant's premises, and defendant replaces these fences, thereby obstructing the road, he is guilty, though the damages assessed to defendant had not been paid, since it is not essential that actual payment must precede the act of taking of private property for public uses. McIver, 88—686.

PROCESSION.—Members of a procession celebrating any particular day or event are not indictable for obstructing the streets of a town, if the procession is lawful and the streets are not obstructed more than is ordinarily the case under such circumstances. Hughes, 72—25.

VENDEE OF LAND OVER WHICH ROAD RUNS NOT INDICTABLE, WHEN.—Where the proprietor of land through which a road passes and across which he has unlawfully erected a gate, sells the land to another who never actually enters into the land but leases it to others who keep up the gate, the vendee is not indictable for a continuance of the obstruction, but those who keep it up are, or the person who first erected it may be indicted. Pollok, 26 (4 Ired.), 303.

Sec. 574 (2022). Overseers to report all moneys collected to supervisors; failure to discharge duties, misdemeanor; duty of chairman of board of supervisors. 1879, c. 82, s. 8.

The said overseers shall at the meeting of the supervisors in February make a report of all moneys collected by them from parties excused from work on the road for the preceding year, with a statement as to how the same was expended. If any overseer shall fail to discharge any one of the duties imposed by this chapter he shall be guilty of a misdemeanor, and on conviction shall be fined seven dollars, and in default of payment of fine and cost be imprisoned not exceeding five days. In case of failure of any overseer to make any report to the board of supervisors of public roads of his township, as provided in this chapter, it shall be the duty of the chairman of such board immediately upon such failure to make a sworn statement of the fact before some justice of the peace of an adjoining township, who shall immediately issue his warrant for the arrest of the said overseer, and proceed to try him for the offence.

Sec. 575 (2024). Board of supervisors to report to superior court; clerk to deliver report to foreman of grand jury; misdemeanor; punishment. 1879, c. 82, s. 10.

The board of supervisors shall annually make report to the first term of the superior court of their county after the first Monday in August of the condition of the roads of their township, and if the meetings provided for in this chapter have been held by said board, the judge holding such term of the superior court shall after his charge to the grand jury and before they shall retire to their room call upon the clerk of the court for such reports, and they shall then and there be delivered to the foreman of the grand jury; and if any board of supervisors shall fail to make said report or to discharge any other duty imposed by this chapter, they shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned, or both, in the discretion of the court, and the indictment may be either against the board of supervisors, or against the individuals composing it as justices of the peace.

Sec. 576 (2030). Sign-posts at forks of roads to be set up by overseers; penalty for neglect. R. C., c. 101, s. 18. 1784, c. 227, s. 11. 1812, c. 846.

Overseers shall cause to be set up, at the forks of their respective roads, a post or posts, with arms pointing the way of each road, with plain and durable directions to the most public places to which they lead, and with the number of miles from that place as near as can be computed; and every overseer who shall, for ten days after notice of his appointment, neglect to do so and to keep the same in repair, shall forfeit and pay for every such neglect ten dollars.

Sec. 578 (2031). On persons removing or defacing posts or mile-marks. R. C., c. 101, s. 19. 1784, c. 227, s. 11. 1812, c. 846.

Any person, who shall wantonly remove, knock down, or deface the said posts, arms, or any mile-mark, shall, for every such offence, forfeit and pay to the state ten dollars, and be guilty of a misdemeanor.

Sec. 579 (2054). Railroad companies, etc., to keep bridges over county roads; penalty for failure. R. C., c. 101, s. 35. 1838, c. 5, ss. 1, 2, 3, 4.

Railroad, plank road and turnpike companies, each, shall keep up, at their own expense, all bridges on or over county, or incorporated roads, which they have severally made it necessary to be built, in establishing their respective roads; and on failure to do so, shall be guilty of a misdemeanor, and fined; and execution may issue for fine and costs; and shall forfeit and pay twenty-five dollars to any person who may sue for the same.

Sec. 580 (2057). May be changed or discontinued and gates or bars erected, etc.; penalty for injuring them. R. C., c. 101, s. 38. 1798, c. 508, ss. 1, 2, 3. 1834, c. 16, s. 1. 1887, c. 266.

Cartways, laid off according to the provisions of this chapter, may be changed or discontinued upon application by any person concerned, under the same rules of proceeding as they may be first laid off, and upon such terms as to the board of supervisors shall seem equitable and just. And any person through whose land a cartway may pass, may erect and keep in good repair convenient gates across the same; and if any person shall leave open, break down, or otherwise injure such gates or bars, he shall forfeit and pay, for every such offence, ten dollars to the person erecting the same or his assigns of the land; and if the offence shall be maliciously done, he shall be guilty of a misdemeanor.

Sec. 581. High water marks, duty of overseers to establish. 1889, c. 517.

It shall be the duty of the overseers of roads to establish high water marks or signals on both sides of any river, creek or stream which is used as a ford for a public highway, and to permanently fix the same.

Any overseer failing to carry out the provisions of this act shall be guilty of a misdemeanor.

ROBBERY.

Sec. 582 (1201). On conviction for robbing or stealing, the person robbed is entitled to the restitution of his property. R. C., c. 35, s. 34. 21 Hen. VIII. c. 11.

Upon the conviction of any felon for robbing or stealing any money, goods, chattels, or other estate of any description whatever, the person from whom such goods, money, chattels, or other estate were robbed or stolen, shall be entitled to restitution thereof; and the court may award restitution of the articles so robbed or stolen, and make all such orders and issue such writs of restitution or otherwise, as may be necessary for that purpose.

WHAT CONSTITUTES ROBBERY.—Defendant, on overtaking the prosecutor and his brother on the highway, accused them of robbing him in South Carolina which they denied, and took hold of the brother and told him he had to go back to South Carolina with him, but the brother refused to go. "Defendant then demanded our money, and said he intended to have our money or our lives, and if we attempted to go on he would shoot us."

He was told they had no money, and then said if they would give him one dollar he would let them go, and being still refused got a fence rail and put it across the road in front of prosecutor's wagon, and told them if they came up to it he would shoot out their hearts. The prosecutor then told him if he would let them go he would give him the dollar and handed it to him, but defendant, after holding it a minute, threw it down and demanded seven dollars. The prosecutor testified that he gave the defendant the dollar because he was afraid of him: *Held*, that the court properly instructed the jury that if defendant made such a demonstration of force as to put the prosecutor in fear, and under that fear the prosecutor gave him the dollar, and he kept it only one minute, he was guilty. *Burke*, 73—83.

Where defendant entices a boy of twelve years of age into the woods near a highway, knocks him down with a club and takes his money, he is guilty of robbery. *Bradburn*, 104—881.

One who by violence robs another of money, and afterwards throws it down and refuses to carry it off, is guilty. *Burke*, 73—83.

The kind and value of the property taken is immaterial; force or fear is the main element in robbery. *Burke*, 73—83.

WHAT DOES NOT CONSTITUTE ROBBERY.—The evidence was that the prosecutor had shown his money in a barroom where defendant was; that when he started home defendant and another followed him and defendant pretended to help him on his horse, and put his hand in his pocket and was accused of trying to rob him; that prosecutor then rode towards home and about one-half mile from town he was struck from behind and rendered unconscious, and, upon regaining consciousness, his money was gone; that across fields it was nearer from the barroom to the place where he was robbed than by the road, and that, when prosecutor started homeward by the road, defendant started across the field, and that next morning tracks which defendant's shoes fitted were found in the road where prosecutor was robbed: *Held*, that the evidence was not only sufficient to be submitted, but clearly warranted the verdict. *Leach*, 119—828.

Simply snatching a thing unawares is not robbery; but if there be a struggle to keep it, or any violence done to the person, the taking is robbery. *Trexler*, 4 (2 Car.), 90 (188).

DISTINCTION BETWEEN TRESPASS AND ROBBERY.—The distinction between forcible trespass and robbery is that in robbery there is a felonious intent, while in forcible trespass there is not. *Sowls*, 61 (Phil.), 151.

An intent to evade the law is the felonious intent which distinguishes robbery from forcible trespass. This felonious intent, which is found in robbery and larceny, is manifested by concealing from the owner the thing taken, *the person who took it*. *Deal*, 64—270.

INDICTMENT.—An allegation that the robbery was committed "in the public highway," is sufficient, without specifying to what points the highway leads. *Burke*, 73—83.

It is not necessary that the word "steal" should be used in the indictment. *Brown*, 113—645.

A charge that defendant "did make an assault" and "put in bodily fear and danger of his life," and "then and there feloniously and violently did seize, take and carry away ten dollars in money from the prosecutor," is an explicit allegation of force. *Brown*, 113—645.

The indictment may charge that the robbery was committed *in* the highway or *near* it. *Anthony*, 29 (7 Ire.), 234.

An allegation that the property was taken from the person and against the will of the owner, feloniously and violently, is sufficient. *Cowan*, 29 (7 Ire.), 239.

It is not necessary to specify to what points the highway led. *Burke*, 73—83.

WHAT IS A HIGHWAY—STREET.—A street is a public highway in which robbery may be committed. *Cowan*, 29 (7 *Ire.*), 239.

WHARF.—A public wharf, merely as such and not being a part of a street, is not a highway. *Cowan*, 29 (7 *Ire.*), 239.

RAILROAD NOT A HIGHWAY.—A railroad is not a public highway within the meaning of a statute punishing robbery along a public highway with death. *Johnson*, 61 (*Phil. Law*), 140.

WHEN NEAR HIGHWAY.—Robbery is committed near a highway where the scene of the crime is within 50 or 75 yards of a county road, and in plain view thereof, though neither the prosecutor nor defendant knew of such road, and the prosecutor had not been enticed to leave a highway, and the parties had not gone to the place on any highway. *Nicholson*, 124—820.

Where the allegation is that the robbery was committed *in* the highway evidence that it was *near* the highway is not competent. *Cowan*, 29 (7 *Ire.*), 239.

MAY BE CONVICTED OF LARCENY.—A defendant indicted for robbery may be convicted of larceny. *Nicholson*, 124—820.

On indictment for a robbery, the defendant may, if the evidence justifies it, be acquitted of the robbery and convicted of larceny, since robbery includes larceny. *Cody*, 60 (*Winst.*), 194.

An averment, on indictment for burglary, that the breaking was with intent to steal is supported by proof that the entry was made with a purpose to commit robbery, since to rob implies to steal by force. *Halford*, 104—874.

NOT NECESSARY THAT OWNER SHOULD BE PUT IN TERROR.—It is not necessary to constitute robbery that the owner should be put in great terror, but it is sufficient if he was apprehensive of danger. *Nicholson*, 124—820.

VALUE NEED NOT BE GIVEN.—The value or description of the article taken is not material, and need not be set out in the indictment, since the gist of the offence is not the *taking* but a taking by putting in fear or by force. *Brown*, 113—645, *Burke*, 73—83.

Sec. 583. Train robbery and attempts defined; punishment. 1895, c. 204.

SECTION 1. Hereafter any person or persons who may stop, or cause to be stopped, or impede, or cause to be impeded, or conspire together for that purpose, any locomotive engine, or any car, or cars, on any road in this state, by intimidation of those in charge thereof by force, threats, intimidation, or otherwise, of taking therefrom or causing to be delivered up to such person or persons forcing, threatening, or intimidating, anything of value, to be appropriated to his or their own use, shall be guilty of attempting train robbery, and, on conviction thereof, shall be punished by confinement in the penitentiary not less than two years nor more than twenty years.

SEC. 2. Any and all persons who may hereafter enter upon any locomotive engine, car or cars on any railroad in this state, and by threats, the exhibition of deadly weapons, or by the discharge of any pistol or gun on, in or near, any such engine, car or cars,

induce or compel any person or persons on such engine, car or cars to submit and deliver up, or allow to be taken therefrom, or from him or them, anything of value, shall be held guilty of train robbery, and, on conviction thereof, shall be punished by imprisonment in the penitentiary not less than ten years nor more than twenty years.

ROUT.

See RIOT.

RULES FOR CONSTRUING STATUTES.

Sec. 584 (3765). Rules for construing statutes. R. C., c. 108, s. 2.

In the construction of all statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the same statute, that is to say:

(1) SINGULAR AND PLURAL NUMBER, MASCULINE GENDER, ETC.

Every word, importing the singular number only, may extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only, may extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine gender only, may extend and be applied to female as well as to males;

(2) AUTHORITY OF PUBLIC OFFICERS, ETC., EXERCISED BY MAJORITIES, UNLESS, ETC.

All words purporting to give a joint authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority;

(3) "MONTH" AND "YEAR."

The word "month" shall be construed to mean a calendar month, unless otherwise expressed; and the word "year" a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord";

(4) LEAP-YEAR, HOW COUNTED. R. C., c. 31, s. 108. 21 HEN. III.

In every leap-year, the increasing day and the day before, in all legal proceedings shall be counted as one day;

(5) "OATH" AND "SWORN."

The word "oath" shall be construed to include "affirmation," in all cases, where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall be construed to include the word "affirm";

(6) "PERSON" AND "PROPERTY."

The word "person" may extend and be applied to bodies politic and corporate, as well as to individuals. The words "real property" shall be coextensive with lands, tenements and hereditaments. The words "personal property" shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descending to the heirs at law. The word "property" shall include all property, both real and personal;

(7) "PRECEDING" AND "FOLLOWING."

The words "preceding" and "following," when used by way of reference to any section of The Code, shall be construed to mean the section next preceding or next following that in which such reference is made; unless when some other section is expressly designated in such reference;

(8) "SEAL."

In all cases in which the seal of any court or public office shall be required by law to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal, made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto;

(9) "WILL."

The term "will" shall be construed to include codicils as well as wills;

(10) "WRITTEN" AND "IN WRITING."

The words "written" and "in writing," may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters: *Provided*, that in all cases where a written signature is required by law, the same shall be in a proper handwriting, or in a proper mark;

(11) "STATE" AND "UNITED STATES."

The word "state" when applied to the different parts of the United States, shall be construed to extend to and include the District of Columbia and the several territories so called; and the words "United States" shall be construed to include the said district and territories;

(12) "IMPRISONMENT FOR ONE MONTH," HOW CONSTRUED. 1879, c. 92, s. 4.

The words "imprisonment for one month," wherever used in any of the statutes, shall be construed to mean "imprisonment for thirty days."

Sec. 585 (3766). How parts of acts amended to be considered. 1868-'9, c. 270, s. 22. 1870-'1, c. 111.

Where a part of the statute is amended it is not to be considered as having been repealed and re-enacted in the amended form, but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment.

SABBATH BREAKING.

See SUNDAY.

SCHOOLS.

Sec. 586 (2592). Misdemeanor to disturb any school or temperance society, or to injure or set fire to any school house. 1881, c. 200, s. 63. 1885, c. 140. 1889, c. 199, s. 35.

Every person who shall wilfully interrupt or disturb any public or private school, or temperance society or organization, or any meeting lawfully and peaceably held for the purpose of literary and scientific improvement or for the discussion of the subject of temperance or question of moral reform, either within or without the place where such meeting or school is held, or injure any school building or deface any school furniture, apparatus or other school property or property of any temperance society or organization, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not more than thirty days. Any person who shall wilfully set fire to, or procure the same to be done, any school house, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the penitentiary or county jail, and may also be fined in the discretion of the court.

On indictment for disturbing or interrupting a public school it appeared that defendants, claiming the right to occupy a school-house, refused to surrender it to one who had been elected to teach a public school thereat and thus prevented a school being held there: *Held*, that defendants were not guilty. *Spray*, 113—686.

Sec. 587 (2554). County treasurer to receive and disburse school fund; his bond; misdemeanor, etc. 1881, c. 200, s. 25.

The county treasurer of each county shall receive and disburse all public school funds; but before entering upon the duties of his office, he shall execute a justified treasurer's bond, with security in double the amount of all public school moneys received by him or by his predecessor during the previous year, conditioned for the faithful performance of his duties as treasurer of the county board of education, and for the payment over to his successor in office of any balance of school moneys that may be in his hands unexpended, and the county board of education may, from time to time, if necessary require him to strengthen said bond, and in default thereof the members of the county board of education shall be guilty of a misdemeanor, and for any breach of said bond, action shall be brought by the county board of education.

NOTE.—The bond is to be taken and approved by the board of county commissioners. See section 4, chapter 199, Laws of 1889.

Sec. 588 (2562). Treasurer failing to report to said superintendent guilty of misdemeanor. 1881, c. 200, s. 34. 1883, c. 121, s. 13.

Any treasurer of a county board of education failing to make the reports required of him at the time and in the manner prescribed shall be guilty of a misdemeanor, and be fined not less than fifty dollars and not more than two hundred dollars, or imprisoned not less than thirty days nor more than six months, in the discretion of the court.

Sec. 589 (2563). Sheriff to pay annually in money to treasurer of the county board, amount of state and county taxes levied for school purposes, etc.; misdemeanor; penalty; action on bond. 1881, c. 200, s. 35. 1881, c. 201.

The sheriff of each county shall pay annually in money to the treasurer of the county board of education thereof, on or before the thirty-first day of December of each year, the whole amount levied, less such sum or sums as may be allowed on account of insolvents, for the current year, by both state and county, for school purposes; and, on failure so to do, shall be guilty of a misdemeanor, and fined not less than two hundred dollars, and be liable to an action on his official bond for his default in such sum as will fully cover such default, said action to be brought to the next ensuing term of the superior court and upon the relation of the county board of education for and in behalf of the state.

Sec. 590. False returns of school census by school committeemen, indictable. 1889, c. 353.

Any person who is a member of the school committee of any district, as such, shall knowingly and wilfully take a false or inaccurate census, or make a false or inaccurate return or report to the county superintendent of public instruction of the number of children in his district between the ages of six (6) and twenty-one (21), shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined and imprisoned at the discretion of the court.

Sec. 591. Unlawful for officers or employees of educational institutions to furnish supplies. 1897, c. 543.

SECTION 1. It shall be unlawful for any member of any board of directors, board of managers or board of trustees of any of the educational, charitable, eleemosynary or penal institutions of the state, or any member of any board of education, or any county or district superintendent of schools, or examiner of teachers, or any school trustee of any school or other institution supported in whole or in part from any of the public funds of the state, or any

officer, agent, manager, teacher or employee of any said boards, to have any pecuniary interest, either directly or indirectly, proximately or remotely, in supplying any goods, wares or merchandise of any nature or kind whatsoever, to any of said institutions or schools.

Nor shall any of said officers, agents, manager, teachers or employees of said institutions or schools or state or county officers, act as agent for any manufacturer, merchant, dealer, publisher or author for any article of merchandise to be used by any of said institutions or school, nor shall they receive, directly or indirectly, any gift, emolument, reward or promise of reward, for their influence in recommending or procuring the use of any manufactured article, goods, wares or merchandise of any nature or kind whatsoever for any of said institutions or school.

Any person violating the provisions of this act shall be forthwith removed from his position in the public service, and shall, upon conviction, be deemed guilty of a misdemeanor, and fined not less than fifty dollars (\$50.00) nor more than five hundred (\$500) dollars, and be imprisoned in the discretion of the court.

SCIRE FACIAS.

The object of a *scire facias* is to notify the cognizor to show cause why the cognizee should not have execution for the sum acknowledged. Mills, 19 (2 D. & B.), 552.

It is not necessary to issue a *scire facias* returnable to next term of a court after the judgment *nisi* is taken on an appearance bond. Jenkins, 121—637.

The recorded default makes the judgment absolute subject only to matters of avoidance, and no judgment of forfeiture is required before issuing the *scire facias*. Mills, 19 (2 D. & B.), 552.

The *scire facias* must issue and judgment be had thereon previous to suing out execution upon the forfeited recognizance. Mills, 19 (2 D. & B.), 552.

A defaulting witness who has judgment *nisi* entered against him, may apply to the court for a remission of the forfeiture before a *scire facias* issues against him. Herndon, 5 (1 Murph.), 269.

SEAMEN.

Sec. 592 (1108). Seamen, enticing from vessels, a misdemeanor. 1879, c. 219, s. 1. 1881, c. 256, s. 1.

Any person who shall induce any seaman, in the employment of any domestic or foreign vessel, in any of the ports of North Carolina, to leave any such vessel before his term of service shall have expired, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

Sec. 593 (1109). Seamen, unlawful to secrete or harbor those who have deserted. 1879, c. 219, s. 2. 1881, c. 256, s. 2.

Any person who shall secrete or harbor any such seaman, who has deserted from any domestic or foreign vessel, knowing that such seaman has deserted, shall be guilty of a misdemeanor, and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days; and if such seaman be found concealed or secreted by any person on his premises, such concealment and secretion shall be deemed *prima facie* evidence that such person knew that such seaman was a deserter.

WARRANT.—A warrant for harboring a seaman in proper form is not defective because the word "*knowing*" is omitted in the affidavit upon which it is based. Bryson, 84—780.

Sec. 594 (1110). Seamen, justices of the peace authorized to issue search warrants for those who have deserted. 1881, c. 256, s. 3.

If any credible witness shall prove, upon oath before any justice of the peace, that any person has concealed on his premises any seaman who has deserted from any such domestic or foreign vessel, it shall be lawful for such justice to grant a search warrant to be executed within the limits of his county to any proper officer, authorizing him to search for such seaman, and to arrest the person on whose premises he may be found, and the person on whose premises such seaman shall be found shall be adjudged to pay the costs of such search warrant, if on examination it shall appear that such seaman was secreted or concealed by such person; otherwise the costs shall be paid by the party making the complaint.

Sec. 595 (1111). Seamen, either party may appeal, justice to reduce to writing testimony of all material witnesses and return to appellate court; fees of justice. 1881, c. 256, ss. 4, 5.

In all cases arising under the three preceding sections, if any appeal is prayed by either party at the time of the trial, it shall be granted; but no appeal shall be granted by any justice at any

time after the final hearing of the case; in case an appeal is prayed at the trial, it shall be the duty of the justice to immediately proceed to reduce the testimony of any witness whose testimony is material to writing (if such witness shall be master, officer, or seaman on board of any vessel), in the presence of the adverse party, who may cross-question such witness, which testimony shall be subscribed by such witness and returned by the justice with the papers in the case; and on the hearing in the appellate court, the testimony so taken and reduced to writing by such justice shall be read, heard and accepted as the true and lawful testimony of such witness, as if such person were in person present to give evidence. For reducing such testimony to writing the justice shall receive the same fees as are allowed for taking depositions.

SEARCH WARRANT.

Sec. 596 (1171). Of search warrants. 1868-'9, c. 178, sub chap. 3, s. 38.

If any credible witness shall prove, upon oath, before any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, that there is a reasonable cause to suspect that any person has in his possession, or on his premises, any property stolen, or any false or counterfeit coin resembling, or apparently intended to resemble, or pass for, any current coin of the United States, or of any other state, province or country, or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of any such coin; or any false and counterfeit notes, bills or bonds of the United States, or of the state of North Carolina, or of any other state or country, or of any county, city or incorporated town; or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of such note, bill or bond, it shall be lawful for such justice, mayor or chief magistrate of any incorporated town, to grant a warrant, to be executed within the limits of his county or of the county in which such city or incorporated town is situated, to any proper officer, authorizing him to search for such property, and to seize the same, and to arrest the person having in possession, or on whose premises may be found, such stolen property, counterfeit coin, counterfeit notes, bills or bonds, or the instruments, tools or engines for making the same, and to bring them before any magistrate of competent jurisdiction, to be dealt with according to law.

508 SEARCH WARRANT—SECRET POLITICAL SOCIETIES.

SEARCH WARRANT, WHEN GRANTED.—A search warrant in this state is to be granted only when a larceny is charged to have been committed. McDonald, 14 (3 Dev.), 468.

Before a search warrant can be granted oath must be made before the justice that a felony has been committed, and that the party complaining has probable cause to suspect that the stolen goods are in such a place, and the affidavit should show his reasons for the suspicion. McDonald, 14 (3 Dev.), 468.

Sec. 597 (1172). Search warrant, its form and the proceedings thereon. 1868-'9, c. 178, sub chap. 3, s. 39.

Such search warrant shall describe the article to be searched for with reasonable certainty, and by whom the complaint is made, and in whose possession the articles to be searched for is supposed to be; it shall be made returnable as other criminal process is by law required to be, and the proceedings thereupon shall be as is required in other cases of criminal complaint.

SECRET POLITICAL SOCIETIES.

Sec. 598 (1095). Political societies, secret, prohibited. 1868-'9, c. 267. 1870-'71, c. 133. 1871-'2, c. 143.

If any person, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or for resisting the laws, shall join or in any way connect or unite himself with any oath-bound secret political or military organization, society or association of whatsoever name or character, or shall form or organize, or combine and agree with any other person or persons to form or organize any such organization, or as a member of any secret political or military party or organization shall use, or agree to use, any certain signs or grip or passwords, or any disguise of the person or voice, or any disguise whatsoever for the advancement of its object, and shall take or administer any extra-judicial oath, or any secret solemn pledge, or any like secret means, or if any two or more persons for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or for circumventing the laws, shall secretly assemble, combine or agree together, and the more effectually to accomplish such purposes, or any of them, shall use any certain signs, or grips, or passwords, or any disguise of the person or voice, or other disguise whatsoever; or shall take or administer any extra-judicial oath or other secret

solemn pledge, or if any persons shall band together and assemble to muster, drill or practice any military evolutions, except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction, or if any person shall knowingly permit any of the acts and things herein forbidden to be had, done or performed on his premises, or on any premises under his control, or if any person being a member of any such secret political or military organization, shall not at once abandon the same and separate himself entirely therefrom, every person so offending shall be guilty of a misdemeanor, and fined not less than ten nor more than two hundred dollars, or be imprisoned, or both, at the discretion of the court.

SEDUCTION.

Sec. 599. Seduction under promise of marriage. 1885, c. 248.

Any man who shall seduce an innocent and virtuous woman under promise of marriage, shall be guilty of a crime, and upon conviction thereof shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the penitentiary not exceeding the term of five years: *Provided, however*, that the unsupported testimony of the woman shall not be sufficient to convict: *Provided further*, that marriage between the parties shall be a bar to further prosecution under this act.

WOMAN MUST BE VIRTUOUS AS WELL AS INNOCENT.—The prosecutrix must not only be innocent but *virtuous*, and this implies something more in her conduct than mere innocence of illicit sexual intercourse; she must be pure and chaste as well as innocent, and if she willingly surrenders her chastity, prompted by her own lustful passions, or any other motive than that produced by a *promise* of marriage, she is in *pari delicto*, and the mere promise of marriage would not make it seduction. Ferguson, 107—841.

It is not error to refuse to add to the definition of a virtuous woman as one "who has never had illicit intercourse and who is chaste and pure," the words "and she must have a mind free from lustful and lascivious desires." The law looks at conduct, and motive only as shown by conduct, and not at thoughts undisclosed and natural impulses not acted on. Crowell, 116—1052.

EVIDENCE.—Evidence that the prosecutrix, on one occasion before the alleged seduction, was seen to be intoxicated is inadmissible. Garland, 95—671.

Evidence that the prosecutrix made statements repugnant to her testi-

mony to an elder in the church of which she was a member, who visited her in his official capacity to investigate the charge of seduction against his pastor, is competent. *Ib.*

Parol evidence of the contents of a note written by the prosecutrix appointing an assignation with a third person is competent for the purpose of attacking the character of the prosecutrix, since the contents of the note are purely collateral. *Ferguson, 107—841.*

One H testified for the defence that he had sexual intercourse with the prosecutrix prior to the date of the alleged seduction. One U for the state testified that in a conversation with him the said H had stated in reply to a question that he had never had illicit intercourse with the prosecutrix and that she was a lady. Another witness for the state was allowed to testify that he was near H and U at the time of the conversation, and that, hearing the name of the prosecutrix mentioned, he went near to the parties and heard H say, "It is not so. I always found her to be a lady." The latter testimony was objected to as fragmentary: *Held*, that the testimony was competent since it contained the whole matter in dispute and nothing H could have said could have explained it to mean anything other than that the prosecutrix was a virtuous woman so far as he knew. *Robertson, 121—551.*

It is competent for the state to show that there was sexual intercourse between the parties subsequent to the first alleged act. *Robertson, 121—551.*

CHARGE.—Defendant asked an instruction beginning: "If the jury believes the testimony" of a witness. The instruction was modified as follows: "If the jury believe *from* the testimony" of the witness: *Held*, no error. *Horton, 100—443.*

PROMISE OBTAINED BY FRAUD.—The statute embraces a seduction under a promise of marriage in the nature of a deceit, though if the intercourse is by force the statute does not apply. *Horton, 100—443.*

CONSENT.—Consent of the female to the illicit intercourse is no defence. *Horton, 100—443.*

CHARGE—EVIDENCE.—Where the evidence is that prosecutrix had a child which resembles defendant; that he admitted a promise of marriage, but said he did it only for "devilment," and that prosecutrix's character is good, it is not error to refuse a request to charge the jury that there was no evidence to support the indictment. *Horton, 100—443.*

CHILD MAY BE EXHIBITED.—Where the prosecutrix has had a child which resembles the defendant, the child may be exhibited to the jury. *Horton, 100—443.*

THE PROMISE.—It is the seduction under *promise* of marriage which constitutes the crime, and as to the promise to marry, it is not sufficient that the prosecutrix should be corroborated, but she must be supported by independent facts or circumstances. *Ferguson, 107—841.*

PUNISHMENT.—The statute does not authorize both fine and imprisonment. *Crowell, 116—1052.*

STATUTE LIMITATIONS.—Deceit being the very essence of the offence, the statute exempting certain crimes, including deceit, from the two years limitation, applies to the offence of seduction. *Crowell, 116—1052.*

SEEDS.

Sec. 600. Seeds, packages to be marked. 1891, c. 331.

Any person or persons doing business in this state who shall sell seed, or offer for sale any vegetable or garden seed that are not plainly marked upon each package or bag containing such seed, the year in which said seed were grown, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars or more than fifty dollars, or imprisoned not more than thirty days for each and every offence: *Provided*, that the provisions of this act shall not apply to farmers selling seed in open bulk to other farmers or gardeners.

Any person or persons who shall, with intention to deceive, wrongly mark or label, as to date, any package or bag containing garden or vegetable seed shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten nor more than fifty dollars, or imprisoned not less than ten nor more than thirty days.

SEPARATION OF WITNESSES.

A witness who has been in court and heard the examination of the other witnesses may be examined, notwithstanding an order has been made for a separation of witnesses, and that they be sent out of the hearing of the court. Sparrow, 7 (3 Murph.), 487.

SEVERANCE.

A severance is a matter of discretion, the exercise of which will not be reviewed in the absence of abuse of such discretion. Finley, 118—1161.

Whether or not a severance will be allowed and the prisoners allowed a separate trial, is a matter of discretion in the trial judge, and its refusal can not be assigned as error. Gooch, 94—987. Collins, 70—241.

A motion for a severance is submitted to the discretion of the trial judge, and his action is not reviewable except in case of gross abuse. Oxendine, 107—783. Underwood, 71—502.

The fact that the court refused a separate trial to a white prisoner who was jointly indicted with two colored prisoners is not assignable as error, since persons jointly indicted can not claim separate trials as a

matter of right, and the refusal of such motion is a matter of discretion. Collins, 70—241.

The refusal to grant a severance is a matter of discretion, and not reviewable. Moore, 120—540.

SLANDER.

Sec. 601 (1113). Slander of woman by charge of incontinency, penalty. 1879, c. 156.

If any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman, by words written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor, and fined or imprisoned in the discretion of the court.

WHAT AMOUNTS TO A CHARGE OF INCONTINENCY.—Calling an innocent woman “a d—d whore,” in the hearing of a third person, is a charge of incontinency. Shoemaker, 101—690.

Saying of a woman “she had promised to let me have criminal intercourse with her, and I intend to have that thing,” does not amount to a charge of incontinency within the meaning of the statute. Such words impute a lascivious disposition, but imply no criminal act accomplished. Moody, 98—671.

EVIDENCE.—Evidence of a prevalent report of sexual intimacy between the prosecutrix and another, the making of a charge of such intimacy being the defamatory matter specified in the indictment, is inadmissible to disprove its wanton and malicious utterance. Hinson, 103—374.

The husband of the prosecutrix, being examined as a witness for the state, was asked if he had not told a certain person named that he had sexual intercourse with the prosecutrix before he married her, and he denied that he had said so. Defendant then offered to show by himself and another witness that the husband said to them “that he would rather pay two dollars and a half and marry the woman than have a bastard sworn to him,” but this evidence, on objection, was excluded: *Held*, no error, since the matter was wholly collateral to the issue, and defendant was bound by the answer of the husband. Morris, 109—.

After the examination of the prosecutrix in chief, counsel for the defendant proposed to ask her how many times she and her husband had separated and the cause of the separations. The court gave leave to ask the question for the purpose of impeaching the prosecutrix, but the counsel answered, “We want to show the cause of the separation,” and the court refused to allow the question: *Held*, that it was discretionary with the court to allow the question. Morris, 109—820.

Words written or spoken before or after those which forms the basis of the action are admissible to show the animus of the defendant, and also the mode and extent of their repetition. Mills, 116—1051.

Where defendant undertakes to justify the words spoken on the ground that he had only repeated a rumor, without wrong motive, an affidavit made by him, at a prior term of court, to secure a continuance in the case

on the ground of the absence of a witness by whom he expected to prove the unchastity of the prosecutrix, is admissible. *Mills*, 116—1051.

PRIVILEGED COMMUNICATIONS.—Statements made by defendant to his church council to which he had been summoned to explain his separation from his wife were privileged. *Misenheimer*, 123—758.

DIVORCE PROVED BY ADMISSIONS.—The admission of defendant that he had been divorced from the prosecutrix in another state is competent evidence. *Misenheimer*, 123—758.

Where a witness testified that the character of the prosecutrix was good up to the time of her present trouble, it was error to refuse to permit the defendant to ask the witness on cross-examination what her character was at the time of the trial. *Spurling*, 118—1250.

PRESENCE OF THIRD PERSON.—The wife of the slanderer is a third person within the meaning of the law, and defamatory words, amounting to a charge of incontinency, spoken in a loud and angry tone in the presence of the speaker's wife alone, render defendant guilty. Such language used in such manner is not protected as being the confidential statement of a husband to his wife. *Shoemaker*, 101—690.

HUSBAND AND WIFE.—A husband can not be indicted for slandering his wife. *Edens*, 95—693.

DEFINITION OF THE TERM "INNOCENT WOMAN."—A woman who has never had actual sexual intercourse with a man is an innocent woman within the meaning of the statute, even though she and a man were surprised in each other's embrace about to commit the act of copulation, which was not completed in consequence of discovery. *Hinson*, 103—374.

It being admitted that the parties had had illicit intercourse before their marriage and that the prosecutrix had given birth to a child five months after their marriage, but her character being proven good both before and after marriage with this exception, the court properly refused to charge that she was not an innocent woman. *Misenheimer*, 123—758.

A witness testified that defendant related to witness a conversation which defendant alleged occurred between him and his wife, before they were divorced, in which defendant stated that his wife had confessed to him her infidelity, and the court charged that if the prosecutrix was an innocent woman the law presumed that this statement to the witness was malicious: *Held*, that such instruction was erroneous in that it left out the question as to whether the prosecutrix had actually told defendant what he stated to the witness. *Misenheimer*, 123—758.

Where the evidence was that defendant said of a chaste woman that she looked like a woman who had miscarried, it was error to instruct the jury that the words *per se* implied malice. Such language simply expresses an opinion as to her personal appearance, which the defendant may explain. *Benton*, 117—788.

ADMISSION OF THE WORDS—EFFECT.—Where defendant admits using words which amount to a charge of incontinency, and attempts to justify by proving their truth, the only question for the jury is the innocence of the woman. *Malloy*, 115—737.

BURDEN OF PROOF ON ADMISSION OF THE WORDS.—The admission of defendant that he spoke the words charged, does not shift the burden upon him to show that he had not slandered an innocent woman. *McDaniel*, 84—803.

SEDUCTION OF PROSECUTRIX BY DEFENDANT.—A man can not seduce an innocent woman and then escape punishment for a charge of slander in imputing to her illicit intercourse with other men by simply proving her illicit intercourse with him. *Misenheimer*, 123—758.

MALICE.—Where a slanderous charge is made, malice is implied, except in case of a privileged communication. Malloy, 115—737. Misenheimer, 123—758.

SLANDER—PRESUMPTION OF THE INNOCENCE OF PROSECUTRIX.—On indictment for the slander of an innocent woman, her innocence is a question for the jury upon the evidence, and no presumption of her innocence can be allowed to weigh against the defendant. Notwithstanding the fact that the law raises a presumption in favor of the integrity of persons generally, it can not raise conflicting presumptions, and since every defendant is presumed to be innocent of the charge against him until *proved* to be guilty, there is necessarily no presumption as to the innocence of the prosecutrix in a case of alleged slander. McDaniel, 84—803.

INDICTMENT.—It is not necessary for the indictment to state “the circumstances under which the words were spoken by which the *attempt* is charged to have been made. McIntosh, 92—794.

An indictment which charges that defendant, “attempting wantonly and maliciously to injure and destroy the reputation of one L B, being an innocent and virtuous woman, did, by words spoken, declare, in substance, that the said L B was an incontinent woman,” is sufficient without setting out the words spoken, or the circumstances under which they were spoken. Haddock, 109—.

An indictment which fails to charge that the prosecutrix is “an innocent woman” is fatally defective. Aldridge, 86—680.

CHARGE.—Defendant asked the following instruction: “That in passing upon her innocence, it is not requisite that the woman should commit a criminal act of sexual intercourse, but it is sufficient if the jury find such acts of indulgence in sexual propensities and a willingness to submit to the embraces of a man, short of actual connection, which are inconsistent with innocence and purity, and that if she attempted to have such connection and it was ineffectual, not because of her repugnance, but of some physical defect in her person, she is not an innocent woman in contemplation of the statute”: *Held*, that the refusal to give such instruction was proper. Following *State v. Davis*, 92—764. Brown, 100—519.

A charge that an innocent woman is “one who had never had actual illicit intercourse with a man” is correct. Davis, 92—764.

A witness having testified that the prosecutrix's character was good, defendant's counsel asked him if he had not heard one G say that he had had sexual intercourse with the prosecutrix. To this question the solicitor said he would make no objection, provided he be allowed to prove that G, who was then in another state, had denied making such statement. Defendant's counsel said he would object to such proof. The judge then asked, in the hearing of the jury, if defendant's counsel thought “that would be fair”: *Held*, that such remark of the judge was not in violation of sec. 413 of The Code. Brown, 100—519.

In such case a witness having testified to the good character of another witness, J, in answer to questions put by the judge and solicitor, said that he permitted J to visit his family: *Held*, that the effect of such questions was simply to ascertain the witness' estimate of *good character*, and permitting them was not error. *Ib*.

Where the prosecutrix testifies that she has been married twelve years; that her first child was born six months after her marriage and that her husband was the father; that she had carnal intercourse with her husband before their marriage, but that she never had such intercourse with any other man, and there is proof that her general character for virtue is good, an instruction that if the jury believe that the prosecutrix never had sexual intercourse with any person except her husband, and

that she had, with the exception of what occurred between her and her husband before their marriage, been a virtuous woman, she was an innocent woman within the meaning of the statute, is proper. *Grigg*, 104—882. *Misenheimer*, 123—758.

CONSTRUCTION OF THE STATUTE.—The word “or” in the statute can not be interpreted to mean “and,” and the court can not punish a person convicted of this offence by both fine and imprisonment. *Walters*, 97—489.

SPIRITUOUS LIQUORS.

Sec LIQUOR SELLING—LOCAL OPTION.

SPRINGS, WELLS AND CISTERNS.

Sec. 602 (1114). Springs, wells and cisterns, wilful injuring; penalty. *R. C.*, c. 34, s. 97. 1850, c. 104.

If any person shall wilfully put into the well, spring or cistern of water of any person, any substance or thing, whereby such well, spring, or cistern may be endamaged, or the water thereof be made less wholesome or fit for use, he shall be guilty of a misdemeanor.

STATUTE.

All acts passed at the same session of the legislature are to be considered as one statute. *Bell*, 25 (3 *Ire.*), 506.

If, pending an appeal, the statute authorizing the indictment is repealed, judgment will be arrested. *Nutt*, 61 (*Phil.*), 20.

The re-enactment by the legislature of a law in the terms of a former law at the same time it repeals the former law is not in contemplation of law a repeal, but is a reaffirmance of the former law, whose provisions are thus continued without any intermission. *Williams*, 117—753. *Sutton*, 100—474.

The title of an act is a legislative declaration of the tenor and object of the act, and when the meaning or subject matter of a statute is at all doubtful the title should be considered. *Woolard*, 119—779.

Where there are two statutes *in pari materia* and the latter contains no words of repeal they are to be taken as one law. Grove, 1—36.

An act of the legislature subsequent to and in amendment of a former act of the same session and correcting an ambiguity therein, is not invalidated by the fact that the date of the ratification of the amended act is erroneously stated, provided it sufficiently appear what prior act is referred to. Woolard, 119—779.

Where the statute creating the offence is repealed during the pendency of the indictment, the defendant is entitled to an acquittal. Cress, 49 (4 Jones), 421.

In a penal statute "or" will never be construed "and" so as to make it more penal. Taylor, 124—803. Kearney, 8—53.

STOCK LAW AND FENCES.

See also INJURY TO PROPERTY.

Sec. 603 (2802). When landowner authorized to remove his half of joint fence; notice; penalty for illegally removing such fence. 1868-'9, c. 275, s. 8. 1883, c. 111.

If any owner of land liable to contribute for the keeping up of a division fence, shall determine neither to cultivate his land nor permit his stock to run thereon, he may give the adjoining owner three months' notice of his determination; and in that case, at any time after the expiration of such notice, and between the first day of January and the first day of March, but at no other time, he may remove the half of the fence kept up by himself, and shall be no longer liable to keep up the same; and if any person shall remove any part of such fence contrary to this section he shall be guilty of a misdemeanor.

Sec. 604 (2799). Planters to keep sufficient fences. R. C., c. 48, s. 1. 1777, c. 121, s. 2. 1791, c. 354, s. 1.

Every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high, unless there shall be some navigable stream or deep watercourse that shall be sufficient, instead of such fence, and unless his lands shall be situated within the limits of a county, township or district, wherein the stock law may be in force.

The law requiring the keeping up of lawful fences is not confined to planters, but applies to all persons. Bell, 25 (3 Ire.), 506.

Where the jury have found the facts it becomes a question of law as to whether, according to the facts found, the fence is such a one as the law requires, or whether the navigable stream, watercourse, etc., is sufficient in lieu of a fence. Lamb, 30 (8 Ire.), 229.

A "pasture" is not "cleared ground under cultivation" within the meaning of the statute requiring a fence five feet high. Perry, 64—305.

A creek, ponded by a mill-dam, five feet deep and twenty-five yards wide, which is frequently crossed by hogs, is not a sufficient watercourse to supply the place of a fence. Lamb, 30 (8 Ire.), 229.

The statute does not apply to mere hirelings and laborers on farms, nor to a foreman whose business is simply to obey instructions of his employer, but a real manager or overseer, with discretion to employ the labor furnished in fencing, is liable to indictment for failure to keep up a proper fence. Taylor, 69—543.

The statute does not extend to persons in the rightful possession of the premises, as *quasi* tenants, occupying the same by consent of the owner. Williams, 44 (Bus.), 197.

JUDGE DECIDES WHETHER FENCE OR STREAM SUFFICIENT.—What is a sufficient fence, and what kind of a navigable stream, or deep watercourse is to be deemed sufficient instead of a fence, are questions of law for the court. Lamb, 30 (8 Ire.), 229.

VIOLATION OF STATUTE A MISDEMEANOR.—A violation of the provisions of this statute is an indictable offence, since all acts or omissions contrary to the command or prohibition of a statute prohibiting a public grievance, is a misdemeanor at common law. Distinguishing State v. Snuggs, 85 N. C., 541. Bloodworth, 94—918.

SPECIAL VERDICT.—Since a special verdict must find all the facts necessary to constitute the offence charged, a special verdict under this statute which fails to find whether defendant comes within the exceptions specified, must be set aside. Bloodworth, 94—918.

Sec. 605 (2811). Unlawful for live stock to run at large within the limits of a county, township or district, which shall adopt the stock law as in this chapter provided; penalties. 1889, c. 504.

No person shall allow his live stock to run at large within the limits of any county, township or district, if the qualified voters of such county, township or district shall adopt the provisions of this chapter relating to the stock law; and no person living within the limits of such stock-law territory shall permit any of his live stock to go or enter upon the lands of another without having obtained leave from the owner of such lands. Any person violating this section shall be guilty of a misdemeanor. The penalties for violating this section and the succeeding sections of this chapter shall apply to all localities where a stock law prevails or shall prevail pursuant to law, and the punishment for every such offence shall not exceed a fine of fifty dollars, or imprisonment for thirty days.

Sec. 606 (2818). Misappropriation of money by impounder. 1889, c. 504.

Any impounder wilfully misappropriating money that he may receive under this chapter, or in any manner wilfully violating any of its provisions, shall be guilty of a misdemeanor, and the punishment for every such offence shall not exceed a fine of fifty dollars, or imprisonment for thirty days.

Sec. 607 (2819). Penalty for receiving or releasing impounded stock. 1889, c. 504.

Any person unlawfully receiving or releasing any impounded stock, or unlawfully attempting to do so, shall be guilty of a misdemeanor, and the punishment for every such offence shall not exceed a fine of fifty dollars, or imprisonment for thirty days.

The prosecutor drove defendant's hogs into an enclosure while defendant was in pursuit of them in view of the prosecutor and after she had sent a message to him not to imprison them, as she was trying to catch them: *Held*, that defendant was not guilty of releasing impounded stock. Hunter, 118—1196.

Sec. 608 (2820). Penalty for injuring fences or leaving open gate. 1889, c. 504.

Any person wilfully tearing down, or in any manner breaking a fence or gate, or leaving open a gate erected around a stock-law territory, or wilfully breaking any enclosure within any township, district or county where a stock law is in force, and wherein any stock is confined, so that the same may escape therefrom, shall be guilty of a misdemeanor, and the punishment for every such offence shall not exceed a fine of fifty dollars, or imprisonment for thirty days.

Sec 609 (2827). Persons living within stock-law territory allowing stock to run at large beyond the limits of said territory, misdemeanor. 1885, c. 371. 1889, ch. 266, 504.

Any person having stock within the limits of a stock-law territory, and allowing the same to run at large beyond the boundaries of said territory, shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than fifty dollars or imprisoned not more than thirty days: *Provided*, that a person owning land outside of the stock-law territory may turn his or her stock upon the said land outside of the stock-law district.

NOTE.—The above section does not apply to counties lying west of the Blue Ridge. Laws of 1885, c. 371.

DUTY OF COUNTY COMMISSIONERS.—County commissioners are not required to personally superintend the fence around the no-fence territory; the statute only requires them to levy the necessary taxes, appoint committees, etc. Commissioners of Wayne, 97—388.

The indictment must point out the specific duty which the county commissioners are required to perform. *Ib*.

Sec. 610. Unlawful to drive horse, etc., from the range into stock law district to secure poundage. 1895, c. 141.

SECTION 1. Any person who shall wilfully and unlawfully take, drive, or in any way move any other person's horse, mule, ass, neat cattle, sheep, hog, goat, or dog, from the range, or elsewhere,

into any stock-law district, or into the limits of any incorporate city or town, having the right to impound or destroy the same, with intent to secure the poundage or other penalty, or with intent to injure the owner of such animal, or to require him to pay any poundage or penalty on account of such animal, or for hire or reward, shall be guilty of a misdemeanor. And any person who shall unlawfully and wilfully remove any animal above named from any lawful enclosure, with intent to injure the owner, shall be guilty of a misdemeanor.

SEC. 2. It shall be unlawful for any city or town, having authority under its charter, to impound any of the animals named in section one (1), to charge or collect any greater poundage or penalty upon the cattle or animals of non-residents than one-fourth the rates imposed upon residents. And it shall be unlawful for any such city or town to collect any poundage, or penalty whatever, upon the cattle or animals of persons who live one mile or more from the corporate limits, for the first three times that the same cattle, or other animals, are impounded in said city or town.

STRANDED GOODS.

Sec. 611 (3859). Finders of wrecked property to notify commissioner; penalty for concealing it. R. C., c. 120, s. 9. 1801, c. 599, s. 5.

When any person shall find any stranded property on or near the seashore, and no owner appears to claim the same, he shall, as soon as possible after saving it, give information to the nearest commissioner of wrecks, and to him deliver the same, for which he shall be entitled to his reasonable salvage, to be ascertained in manner before directed; and should any person finding stranded goods or other property as aforesaid, conceal them, or convert the same to his own use, or fail, for ten days thereafter, to give information thereof to the nearest commissioner of wrecks for his county, he shall pay to the commissioner, discovering the same, five times the value of such property, to be recovered before any court having jurisdiction.

Sec. 612 (3860). Finders, concealing stranded, goods, guilty of larceny. R. C., c. 120, s. 10. 1801, c. 599, s. 6

If any person shall find any stranded goods or property on or near the seashore, and shall, secretly, or without notice of such

finding given to the commissioner, take the same into his possession with the intent to defraud the owner or other person of the said property, or any interest therein; or if, having taken possession of such goods or property, without such intent, he shall afterwards, with such fraudulent intent conceal the same, or fail to give notice to the commissioner, he shall be deemed to have stolen the same goods or other property; and the same goods or other property shall be deemed and held, as to all persons and for all purposes, to have been stolen.

Sec. 613 (3861). Embezzlers or receivers of goods punished as for larceny, etc. R. C., c. 120, s. 11. 1801, c. 599, s. 6.

If any person shall embezzle, steal, or receive, knowing the same to have been embezzled or stolen, any such goods or property, he shall forfeit five times the value of the same to the commissioner; and on conviction thereof shall suffer as if convicted of larceny.

SUNDAY.

SABBATH-BREAKER—INDICTMENT.—Charging a man with being a common Sabbath-breaker and profaner of the Lord's day, is insufficient, as it does not show *how or in what manner* he was a common Sabbath-breaker. Brown, 6 (2 Murph.), 225.

KEEPING OPEN SHOP.—Keeping an open shop and selling goods on Sunday is not an indictable offence in this state. Brookshank, 28 (6 Ired.), 73.

Charging defendant with keeping an open shop and selling goods and liquors on Sunday is insufficient, as it does not show but what the sales might have been to the lame and weary traveller, or to others to whom it would have been a merit to sell instead of a crime. Brown, 6 (2 Murph.), 225.

PERFORMING LABOR.—The profanation of Sunday by performing labor on that day is not an indictable offence in this state. Williams, 26 (4 Ired.), 400.

Sec. 614 (1116). Sunday, fishing on, with seines or nets prohibited; punishment. 1883, c. 338.

It shall be unlawful for any person to fish on Sunday with a seine, drag net or other kind of net, except such as are fastened to stakes; and any person violating this section shall be guilty of a misdemeanor, and fined not less than two hundred dollars nor more than five hundred dollars, or imprisoned not more than twelve months.

Sec. 615 (1117). Sunday, sale of intoxicating liquors on, a misdemeanor. 1876-'7, c. 38.

If any person shall sell spirituous, or malt, or other intoxicating liquors on Sunday, except on the prescription of a physician, and then only for medical purposes, the person so offending shall be guilty of a misdemeanor, and punished by fine, or imprisonment, or both, in the discretion of the court.

[For the decisions under this section, see "LIQUOR, selling on Sunday."]

Sec. 616 (1115). Sunday, hunting on, prohibited; penalty. 1868-9, c. 18, s. 1. 1889, c. 504.

If any person whomsoever shall be known to hunt on the Lord's day, commonly called Sunday, with a dog or dogs, or shall be found off his own lands on Sunday, having a shotgun, rifle or pistol, every person so offending shall be subject to indictment; and shall pay a fine not to exceed fifty dollars, at the discretion of the court, two-thirds of such fine to inure to the benefit of the free public schools in the county of which such convict is a resident, the remainder to the informant, and the punishment for every such offence shall not exceed a fine of fifty dollars or imprisonment for thirty days.

CARRYING GUN INDICTABLE WITHOUT HUNTING.—This statute creates two offences: (1) Hunting on Sunday with a dog; and (2) being off one's own premises having a shotgun, rifle or pistol. Therefore, on the return of a special verdict finding "that the defendant was carrying his gun off of his premises on Sunday, but it is not proved that he was hunting," it was error in the court to adjudge the defendant not guilty. Howard, 67—24.

INDICTMENT.—An indictment charging hunting "on the first day of October, —, on the Sabbath day," is good though the first day of October did not fall on Sunday, nor is the use of the word "Sabbath" instead of "Sunday" material. Drake, 64—589.

SURVEYORS.

Sec. 617. Surveyor's chain to be measured by standard keeper. 1889, c. 409.

The standard measure of a surveyor's chain shall be twenty-two standard yards, a standard half or two-pole chain shall be eleven standard yards, a standard quarter or one-pole chain shall be five and one-half standard yards; but every person using a surveyor's chain, half chain or quarter chain for measuring land shall, before using the same, and every two years thereafter, bring the same to the standard-keeper of his county to be by him measured and sealed.

Any person who shall use any chain for measuring land without having the same first measured and sealed by the standard-keeper, or who shall use the same for a longer period than two years without bringing it to the standard-keeper and having the same measured and sealed by him, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding ten dollars, to be recovered in an action before a justice of the peace.

TELEGRAPHS AND TELEPHONES.

Sec. 619 (1118). Telegraph or telephone poles or wires, injury to, a misdemeanor. 1881, c. 4. 1883, c. 103.

Any person who shall wilfully injure, or destroy, or pull down any telegraph or telephone pole, wire, insulator, or any other fixture or apparatus attached to a telegraph or telephone line, shall be guilty of a misdemeanor, and may be fined and imprisoned, at the discretion of the court.

TERM OF COURT.

Sec. 620 (1229). Term of court expiring during progress of trial, court shall continue it. C. C. P., s. 397. R. C., c. 31, s. 16. 1830, c. 22. 1893, c. 226.

In case the term of a court shall expire while a trial for felony, or for any offence punishable by imprisonment in a penitentiary, or by any greater punishment, shall be in progress, and before judgment shall be given therein, the judge shall continue the term as long as in his opinion, it shall be necessary for the purposes of the case, and he may in his discretion exercise the same power in the trial of any other cause under the same circumstances: *Provided*, this shall not apply to any civil action begun after Thursday of the last week.

FACTS MUST BE SET OUT.—The facts which constitute the necessity for discharging a jury before verdict must be distinctly found by the judge and set out in the record. McGimsey, 80—377.

WHEN THE TRIAL JUDGE MAY BE REVIEWED.—The findings of fact which constitute the necessity for ordering a mistrial and discharging the jury

are conclusive and not the subject of review, but the decision of the judge as to the law arising on the facts may be reviewed and reversed. McGimsey, 80—377.

EXPIRATION OF THE TERM NO GROUND FOR DISCHARGING JURY.—The expiration of a term of court is no ground for discharging a jury before verdict while a trial for a felony is in progress; and this is so though it is the duty of the judge to hold court on the following Monday in another county. The present term may be continued for the purpose of the trial, and the court in the other county may be adjourned by the sheriff from day to day until sunset of the fourth day. McGimsey, 80—377.

DISCHARGE—JEOPARDY.—The jury, charged in a case of capital felony, retired at 12 o'clock on Saturday night, which was the end of the term, and were discharged at 6 o'clock the next evening, Sunday, before verdict, because "it appeared they could not agree." The jury was not polled, nor asked if they could not agree, but answered that they had not agreed: *Held*, that the prisoner having been once in jeopardy was entitled to be discharged. McGimsey, 80—377.

TERM EXPIRING BEFORE VERDICT—CAPIAS.—Where a defendant is on trial for larceny, and the term expires before the jury agrees, and they leave their room and disperse without agreeing, and defendant is suffered to go at large, the solicitor may, without leave of court, cause a capias to be issued against defendant and cause him again to be put on trial. Tilletson, 52 (7 Jones), 114.

Sec. 621 (926). If judge of a superior court not present, court to be adjourned, when. R. C., c. 31, s. 21. C. C. P., s. 396. 1879, c. 11.

If the judge of a superior court shall not be present to hold any term of a court at a time fixed therefor, it shall be the duty of the sheriff to adjourn the court from day to day until the fourth day of the term inclusive, unless he shall be sooner informed that the judge from any cause can not hold the term; if by sunset on the fourth day the judge shall not appear to hold the term, or if the sheriff shall be sooner advised that the judge can not hold the term, it shall then be the duty of the sheriff to adjourn the court until the next term.

PRESUMPTION THAT COURT WAS PROPERLY OPENED.—Where the record recites that a regular term of a superior court was opened and held *Wednesday* of the week fixed by statute, it will be presumed that the sheriff had duly opened the court on Monday and adjourned it from day to day. Weaver, 104—758.

TERRAPINS.

Sec. 622 (3377). When unlawful to take diamond-back terrapins, what size they must be; unlawful to destroy their eggs, misdemeanor; penalty, proviso; possession prima facie evidence of guilt; duty of sheriff and other officers, etc. 1881, c. 115, ss. 1, 6. 1885, c. 128. 1893, c. 188. 1899, c. 582.

It shall be unlawful for any person to take or catch diamond-back terrapins between the fifteenth day of April and the fifteenth

day of July in each year, or any diamond-back terrapins, at any time, of a less size than five inches in length upon the bottom shell, or to interfere with, or in any manner destroy any eggs of the diamond-back terrapin; any person violating this section shall be guilty of a misdemeanor, and shall be fined not less than five dollars, nor more than ten dollars, for each and every diamond-back terrapin so taken or caught, and a like sum for each and every egg interfered with or destroyed: *Provided*, this section shall not apply to parties empowered by the state to propagate the said diamond-back terrapins; and the possession of any diamond-back terrapin between the fifteenth days of April and July shall be *prima facie* evidence that the person having the same has violated this section. It shall be the duty of all sheriffs and constables to give immediate information, to some justice of the peace, of any violation of this section.

THREATS.

See HOMICIDE—ASSAULT AND BATTERY.

THREATENING LETTER.

See BLACKMAILING.

TIMBER.

Sec. 622. Misdemeanor to cut down trees. 1889, c. 168.

If any person not being the *bona fide* owner thereof shall knowingly and wilfully cut down, injure or remove any standing, growing or fallen trees or logs, the property of another, he shall be guilty of a misdemeanor and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both.

TOWNS AND CITIES.

Sec. 623 (3804). Commissioners may enforce their by-laws by proper penalties. R. C., c. 111, s. 16.

They may enforce their by-laws and regulations, by imposing penalties on such as violate them; and compel the performance of the duties they impose upon others, by suitable penalties.

WHAT IS MEANT BY "SUITABLE PENALTIES".—The term "suitable penalties" means pecuniary punishment, and where there is no express provision in a town charter authorizing the commissioners to prescribe imprisonment for a violation of the town ordinances, they have no power to prescribe such punishment. Crenshaw, 94—877.

Sec. 624 (3820). Violation of ordinance a misdemeanor. 1871-'2, c. 195, s. 2.

Any person violating an ordinance of a city or town shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

BUILDINGS IN TOWNS AND CITIES—FIRE LIMITS.—A town ordinance providing that no person shall build or erect within the city limits "any building of any kind or character, or otherwise add to, build upon or generally improve or change any building, without having first applied to the aldermen and obtained a permission for such purpose," is void as reserving to the aldermen the right to refuse the application of one landowner, and grant that of another arbitrarily and despotically, when for all material purposes the two apply for precisely the same privilege. Tenant, 110—.

An ordinance prohibiting the erection of wooden buildings, or buildings with wooden or shingle roofs, in thickly settled portions of the town, and requiring a license before beginning such structures, is valid, provided the ordinance lays down a general rule that precludes the possibility of discrimination and favoritism in granting the license. Tenant, 110—.

Even were a contract has been made for the erection of such wooden buildings before the passage of a valid ordinance forbidding the erection of such buildings, the builder is considered as having entered into the contract subject to the right of the municipality to enact a prohibitory by-law and annul his contract at any time before he begins to build and expend money that he may lose if prohibited from finishing. Tenant, 110—.

Municipal corporations may prescribe a fire limit and forbid the erection of wooden buildings within such bounds as they may prescribe; and it seems that this may be done by or through the delegated authority of the legislature, even where the enforcement of the ordinance causes suspension of work previously contracted for. Johnson, 114—846.

Where the legislature has granted authority to a municipality to supervise or prevent the replacing of a roof with another of shingles, instead of constructing one of material less liable to destruction, or ordinance forbidding an owner of a building within a prescribed limit to alter or repair a wooden building within such limit, without the consent of the aldermen, is not unreasonable, and will be upheld. Johnson, 114—846.

COTTON-WEIGHER'S FEE.—The exaction of a fee of eight cents for each bale of cotton weighed in a town by the public cotton-weigher, one-half to

be paid by each the buyer and seller, is in no sense a tax, but a reasonable market fee that the commissioners have a right to impose. Tyson, 111—687.

A town ordinance prescribing a penalty for buying or selling baled cotton within the corporate limits without having it weighed by the cotton-weigher elected for the town is valid. Tyson, 111—687.

ARREST.—So much of a town ordinance as provides that for a violation of it persons may be “arrested” is void, since the arrest is only by virtue of the above statute and not under the ordinance. Earnhardt, 107—789.

GENERAL LAW.—A town ordinance which makes an act which is a criminal offence under the general law of the state an offence against the town is void. Keith, 94—933.

An ordinance against gambling is void, this being an offence under the general law. McCoy, 116—1059.

Although the act of selling liquor without license in violation of the laws of the state, and also of the ordinance of a city, is *one* act, the offences are different; therefore an ordinance of a city imposing a fine for selling without license does not conflict with the general law of the state prohibiting the sale of liquor without license, and is therefore valid. Stevens, 114—873.

FRESH MEATS.—A town ordinance prohibiting the sale of fresh meats within the corporate limits of the town outside the market-house is valid. Pendergrass, 106—664.

An ordinance prohibited the sale of fresh meats within certain limits without a license, and defendant who conducted the business of a seller of fresh meats outside of such limits, received a telephone message from a person within such limits to bring to the latter fresh meats at an agreed price, and defendant subsequently delivered and received pay for the same: *Held*, that as the buyer would have had the right to reject the meats if not as ordered, the transaction was executory until the delivery, and the sale, therefore, took place within the prohibited limits, and was a violation of the ordinance. Wernwag, 116—1061.

HOG PENS.—A town ordinance is not void for discrimination, which prohibits a citizen from keeping hog pens within 100 yards of the residence of another, but does not prohibit him from keeping them within like distance from his own. Hord, 122—1092.

The commissioners of a town can prohibit the keeping of hog pens in a town to such an extent as to protect the public from nuisances, and of the limits necessary to be prescribed they are the sole judges unless the ordinance be unreasonable. Hord, 122—1092.

SUPPRESSING BAWDYHOUSES.—Under a general power in a charter to suppress houses of ill fame, a city may pass an ordinance forbidding owners to rent houses for the purpose of being used as bawdyhouses, or with a knowledge that they will be so used by the lessee; but its authorities are not thereby empowered to define what is a house of ill fame, or declare a given house to be a bawdyhouse, or to enact that the permitting of prostitution by the owner or occupant of any house therein shall constitute such owner or occupant the keeper of a house of ill fame. Weber, 107—962.

WARRANT.—A warrant joining two defendants charged with a violation of a town ordinance by being drunk in a public place, is fatally defective. Drunkenness is a personal vice. Deaton, 92—788.

A warrant which charges that defendant “did, while driving out of town, act in a disorderly manner by driving at a furious rate and did whoop and hollow so loud as to disturb the quiet of the town * * *

contrary to law and in violation of the sixth ordinance of said town and against the peace and dignity of the state," is sufficient without giving the contents of the ordinance, or averring the authority by which the ordinance was passed, since the court will take notice of the general law giving town authorities power "to enforce their by-laws and regulations." *Merritt*, 83—677.

It is not necessary to set out the ordinance in the warrant. It is sufficient to refer to it by such *indicia* as point it out with sufficient certainty. *Cainan*, 94—880.

REPAIRING STREETS.—The commissioners of a town are not of common right bound to repair the streets, and, therefore, an indictment against them for not repairing must set forth on its face how that obligation has been imposed upon them. *Commissioners*, 15 (4 Dev.), 346.

WORKING STREETS.—Where the charter of a town authorizes its commissioners to adopt ordinances "for the improvement of the streets," an ordinance requiring all male citizens between the ages of eighteen and forty-five years to work a certain number of days on the streets and imposing a fine or imprisonment for wilful refusal to do so, is valid, and a violation of it is a misdemeanor within the jurisdiction of the mayor. *Smith*, 103—403.

LOUD AND BOISTEROUS LANGUAGE.—An ordinance punishing by a fine the use of "loud and boisterous cursing and swearing in any street, house or elsewhere in the city," is valid. *Cainan*, 94—880.

An indictment under such ordinance need not set out the words used by defendant. *Ib.*

DEFAULTING WITNESS.—A fine of \$8 imposed by a mayor upon a defaulting witness for contempt in disobeying a subpoena is not excessive. *Aiken*, 113—651.

PENALTY MUST BE CERTAIN.—An ordinance fixing a penalty of not more than five dollars is void for uncertainty. *Cainan*, 94—883.

A town ordinance which leaves the fine or penalty imposed by it uncertain as to amount is void. *Rice*, 97—421.

If the penalty is left to be fixed in the discretion of the court the ordinance is void. *Worth*, 95—615.

If the penalty is not to exceed a fine of fifty dollars or imprisonment thirty days, the ordinance is void for uncertainty. *Crenshaw*, 94—877.

DISCRETION—VALID ORDINANCE.—An ordinance making the penalty certain, but providing that the mayor, in his discretion, may remit a part of it, is valid. *Cainan*, 94—883.

JURY TRIALS—CONSTITUTION.—Under Const. N. C., art. 1, sec. 13, and art. 4, sections 12, 14 and 27, the legislature may constitute the mayor of a town an "inferior court, with the jurisdiction of a justice of the peace," or a "special court within the corporate limits of the town," with a larger jurisdiction than a justice of the peace, and may dispense with jury trials in "petty misdemeanors," and provide other means of trial for such offences. Such being the case violators of sections 3 and 4 of the ordinance of Morganton, not only incur the penalty therein prescribed, but under sections 11 and 12 of the charter of said town are also guilty of a misdemeanor, and may be punished by the mayor as a "special court." *Powell*, 97—417.

WHERE PART OF ORDINANCE IS VOID.—If a part of an ordinance is void, all other clauses with which the invalid part is necessarily connected or which are dependent on it are void also. *Webber*, 107—962.

LICENSE TAX.—The power to license persons for the privilege of carrying on trades and to require a price therefor is a police power, but does

not give the right to use the license as a mode of taxation for revenue, in the absence of a clear intent in the charter. Bean, 91—554.

The legislature may confer on a municipal corporation the authority to forbid the exposure for sale of produce or other merchandise on any sidewalk, or the space in front of a building used as a sidewalk, in such manner as may incommode passengers, notwithstanding the municipality may not have acquired an easement or title to the soil in the area within which the prohibition is intended to operate. Summerfield, 107—895.

A tax imposed by a municipal government on keepers of livery-stables is not a tax on property, but a tax on occupations or vocations, and is not unconstitutional. Powell, 100—525.

On indictment against a person for refusing and neglecting to take out a license tax imposed by a city ordinance, a special verdict which fails to specify the trade or occupation carried on by defendant and to set forth the specific provisions of the ordinance alleged to have been violated, is fatally defective. Finlayson, 113—628.

An act authorizing the levy of a tax on a particular date will be construed as authorizing the levy on that date or within a reasonable time thereafter. Worth, 116—1007.

A municipality authorized to tax trades, professions, franchises and incomes is not bound to tax them uniformly as to amount. Worth, 116—1007.

A tax upon the manufacture and sale of ice is valid under authority in the charter to tax all subjects of taxation under section 3, article 5, of the constitution. Worth, 116—1007.

The word "trade" when used in defining the power to tax, includes any employment or business for gain or profit. Worth, 116—1007.

ABUSE OR INSULT OF OFFICER.—The commissioners of a town have no power under this statute to enact an ordinance declaring it to be "unlawful for any person to abuse or insult any officer of the town, or member of the police, while in the discharge of his duty." Clay, 118—1234.

SPECIAL POLICEMEN.—An act authorizing the mayor of a town "to appoint special policemen for the protection of property and the preservation of the peace," does not give the mayor power to appoint policemen generally and for an indefinite time, but only to place on duty, at extraordinary times, special policemen to aid the regular policemen to meet the unusual and extraordinary needs of such occasions. Holmes, 118—1201.

PUBLIC HEALTH.—Ordinances relating to the public health and peace of a community are to be commended and encouraged by the courts, and they will not be set aside unless clearly unreasonable. Taft, 118—1190.

SECOND-HAND CLOTHING.—An ordinance prohibiting absolutely the importation and sale of second-hand clothing is unreasonable and void, in that it prohibits a business lawful in itself and not necessarily dangerous, but restrictions may be thrown around such business by requiring fumigation and disinfection, and assurances that it has not been brought from infected places. Taft, 118—1190.

LAWFUL BUSINESS CAN NOT BE PROHIBITED.—Municipalities having power to abate nuisances can not absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. Taft, 118—1190.

DISORDERLY CONDUCT.—To call one a "damned highway robber" in a public restaurant, loud enough to be heard on the street, is punishable under an ordinance against disorderly conduct. Sherrard, 117—716.

HOGS RUNNING AT LARGE.—An ordinance that no hog shall run at large

within the town limits, and prescribing a penalty against the owner for its violation, whether the owner lives within or without the corporate limits, is valid. Tweedy, 115—704.

PROFANE LANGUAGE.—An ordinance prohibiting "the use of profane language in the town" is invalid. Horne, 115—739.

JURISDICTION.—A grant to a riparian owner, running with a navigable stream, extends only to the low-water mark and not to the thread of the stream, and in defining the limits of an incorporated town bordering on such a stream the same rule of construction applies; therefore, where the state confers municipal powers upon a corporation and describes the boundary as running with a navigable river, the jurisdiction of such municipality does not extend beyond the low-water mark in the absence of some provision in its charter expressly or by fair implication extending the limit of its jurisdiction. Eason, 114—787.

MINOR ENTERING BARROOM.—An ordinance prohibiting an unmarried minor from entering a barroom is valid. Austin, 114—855.

The legislature may declare it unlawful for a minor to enter a barroom, and may transfer this power to a municipality. Austin, 114—855.

FINE AND PENALTY SYNONYMOUS.—An objection to an ordinance that it provides for a "fine" instead of a "penalty" is without force, since the two words are used interchangeably. Stevens, 114—873.

LIQUOR SELLER OCCUPYING OWN PREMISES.—An ordinance forbidding one who sells liquor to occupy his own premises between certain hours is void. Thomas, 118—1221.

LOUD AND BOISTEROUS SWEARING.—A town ordinance punishing by a fine every person guilty of "loud and boisterous cursing and swearing, or other disorderly conduct in any street, house or alley," is valid. Dednam, 98—712.

SELLING LIQUOR ON SUNDAY.—A town ordinance punishing the offence of selling liquor on Sunday is void, since such offence is against the general law of the state. Langston, 88—692.

OBSTRUCTING WATERWAY.—Where the town authorities construct a waterway through the lands of another, resulting on several occasions in the flooding of his premises, and the owner of the land places an obstruction in the waterway, but on his own land, by which a street is flooded and made insecure, he may be convicted of a violation of a town ordinance forbidding the placing of obstructions in any waterway so that water shall accumulate in the street, though there has been no condemnation of the land nor other acquisition of the right to the easement. Wilson, 107—865.

SPECIAL VERDICT.—The jury returned a special verdict which concluded as follows: "If on these facts the defendant is guilty in law, we find him guilty; if, on these facts, he is not guilty in law, we find him not guilty." The court entered judgment that "upon this verdict of the jury, the court finds the defendant not guilty, and orders that he be discharged": *Held*, that the special verdict did not amount to a verdict of guilty or not guilty, but that the jury simply found a certain state of facts to be true; and that the judgment of the court should have been that the facts found did or did not constitute the offence charged, and the verdict should have been rendered in accordance with the opinion of the court. Moore, 107—770.

The court, upon the facts found, should instruct the jury that their verdict should be guilty or not guilty. Monger, 107—771.

INDICTMENT OF TOWN OFFICERS.—Different persons can not be charged in the same indictment with different and distinct offences. Hall, 97—474.

Where two distinct boards of city officers are charged with separate

duties in relation to the government of the city, the officers of such boards can not be joined in one indictment charging a breach of public duty. *Ib.*

An indictment for failure to perform a public duty against an officer of a municipal corporation, must state with what particular duty he is charged and his failure to perform it. *Ib.*

An indictment against the mayor and aldermen of a city for a neglect of official duty in failing to remove obstructions from a street and to keep the same in repair, is fatally defective if it fails to point out the particular duty neglected, or to refer to the statute imposing it. *Fish-plate, 83—654.*

Sec. 625 (3818). Criminal jurisdiction of mayors same as that of justices of the peace. 1871-'2, c. 191, s. 1. 1876-'7, c. 243, s. 1.

The mayor or chief officer of every city or incorporated town is hereby constituted an inferior court, to be called a municipal court, and as such court said mayor or chief officer shall be a magistrate and conservator of the peace, and within the corporate limits of any city or town shall have the jurisdiction of a justice of the peace in all criminal matters arising under the laws of the state, or under the ordinances of said city or town. The rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before such mayor or chief officer, and the said mayor or chief officer shall be entitled to the same fees which are allowed to justices of the peace.

MAYOR MAY PUNISH FOR CONTEMPT.—The mayor of a town has jurisdiction to punish for contempt, though not named among the officers having that power as prescribed in sec. 92, since every court inherently possesses such power independent of statutory enactment, besides the fact that under the above statute a mayor is constituted an inferior court and given the powers of a justice of the peace. *Deaton, 105—59.*

JURISDICTION—SUPERIOR COURT.—The superior court has no original jurisdiction to try indictments for violation of town ordinances. *White, 76—15.*

Sec. 626 (3819). Authority of the municipal court; appeals therefrom. 1876-'7, c. 243, s. 2.

As such court said mayor or chief officer shall have authority to hear and determine all cases that may arise upon the ordinances of said city or town; to enforce penalties by issuing execution upon any adjudged violation thereof, and to execute the laws and rules that may be made and provided by the board of aldermen of said city or town, for the government and regulation of the said city or town, but in all cases any person dissatisfied with the judgment of said mayor or chief officer, may appeal to the superior court as in case of a judgment rendered by a justice of the peace.

Sec. 627 (3808). Town constable, his oath, power and duties. *R. C., c. 111, s. 20.*

The town constable shall, before some justice of the peace, take the oaths prescribed for public officers, and an oath that he will

faithfully and impartially discharge the duties of his office according to law. As a peace-officer, he shall have within the town all the powers of a constable in the county; and as a ministerial officer, he shall have the same power as a constable in the county, to execute all process that may be issued by the mayor, and to enforce the ordinances and regulations of the commissioners as they may direct.

CONSTABLE MAY EXECUTE WARRANT ANYWHERE IN COUNTY.—A town constable or marshal may execute a warrant issued by the mayor anywhere within the county in which the town is situated. Sigman, 106—728.

Sec. 628 (3810). Town constables authorized to serve process. 1879, c. 266.

It shall be lawful for city and town constables to serve all civil or criminal process that may be directed to them by any court within their respective counties, under the same regulations and penalties as prescribed by law in the case of other constables.

Sec. 629 (3814). Failure of officers to settle with treasurer a misdemeanor. 1879, c. 194, s. 2. 1881, c. 37.

Any constable or collector of taxes for any town or city, or any other officer, who shall fail to make settlement and full return of all moneys, penalties and fines coming into his hands each month with the town or city treasurer, or other officer authorized to receive the same, shall be guilty of a misdemeanor.

Sec. 630 (3811). Policeman may execute criminal process.

A policeman shall have the same authority to make arrests and to execute criminal process, within the town limits, as is vested by law in a sheriff.

Sec. 631. On appeal mayor to certify ordinance; certificate to be *prima facie* evidence of existence of ordinance. 1899, c. 277.

SECTION 1. In all cases of appeal from mayor's court to the superior court or other court of appeal, when the offence charged is the violation of a town ordinance, the mayor shall send with the papers in the case a true copy of the ordinance alleged to have been violated, and shall certify under his hand and seal that said ordinance was in force at the time of the alleged violation of the same.

SEC. 2. In the trial of appeals from mayors' courts, when the offence charged is the violation of a town ordinance, a certified copy of the ordinance alleged to have been violated, certified as prescribed in section one of this act, shall be *prima facie* evidence of the existence of such ordinance.

TRAMPS AND VAGRANTS.

Sec. 632 (3828). Going about from place to place begging; penalty; proviso. 1879, c. 198, s. 1. 1899, c. 268.

Any person going about from place to place begging, or subsisting on charity, shall be a tramp, and punished by a fine not exceeding fifty dollars or by imprisonment not to exceed thirty days: *Provided*, that any person who shall furnish satisfactory evidence of good character shall be discharged without cost.

Sec. 633 (3829). Tramp entering dwelling-house; penalty. 1879, c. 198, s. 2.

Any tramp who shall enter any dwelling-house or kindle any fire on the highway or on the land of another without the consent of the owner or occupant thereof, or shall be found carrying any fire-arms or other dangerous weapon, or shall threaten to do any injury to any person, or to the real or personal estate of another, shall be punished by imprisonment at the discretion of the court, not to exceed twelve months.

Sec. 634 (3830). Wilful injury to person or property; penalty, imprisonment not to exceed three years. 1879, c. 198, s. 3.

Any tramp who shall wilfully and maliciously do any injury to any person or to real or personal estate of another, shall be punished by imprisonment at the discretion of the court, not to exceed three years.

Sec. 635 (3831). What is evidence of being a tramp 1879, c. 198, s. 4.

Any act of begging or vagrancy by any person, unless a well-known object of charity, shall be evidence that the person committing the same is a tramp.

Sec. 636 (3832). Tramps to be arrested. 1879, c. 198, s. 5.

Any person upon a view of any offence described in this chapter shall cause the said offender to be arrested upon a warrant and taken before some justice of the peace, or may apprehend the offender and take him before a justice of the peace for examination, and, on his conviction, shall be entitled to the same fee as a sheriff.

Sec. 637 (3833). Chapter not applicable to women; or minor under fourteen years. 1879, c. 198, s. 6.

This chapter shall not apply to any woman; or minor under the age of fourteen years; nor to any blind person.

Sec. 638 (3834). Vagrancy, what and how punished. R. C., c. 34, s. 43. 1840, c. 61. 1866, c. 42. 1873-'4, c. 176, s. 12. 1879, c. 198.

Any person who may be able to labor and who has no apparent means of subsistence, and neglects to apply himself to some honest occupation for the support of himself and his family; or, if any person shall be found spending his time in dissipation, or gaming, or sauntering about without employment, or endeavoring to maintain himself or his family by any undue or unlawful means, such person shall be a vagrant, and guilty of a misdemeanor, and punished by a fine not to exceed fifty dollars or by imprisonment not to exceed thirty days; and the offence shall be cognizable before a justice of the peace, who may release the party on his giving a recognizance, with or without security, for his industrious and peaceable deportment for one year or less from the date thereof, and may also impose on him a punishment not to exceed that above mentioned.

TRESPASS.

Sec. 639 (1120). Trespass on land without a license, after being forbidden, a misdemeanor. 1866, c. 60.

If any person, after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days: *Provided*, that if any person shall make a written affidavit before a justice of the peace of the county, that any of his cattle or other live stock (which shall be specially described and set forth in such affidavit) have strayed away, and he has good reason to believe that they are on the lands of another person, then such justice may, in his discretion, allow such person to enter on said premises with one or more servants, without firearms, in the day time (Sunday excepted), between the hours of sunrise and sunset, and make search for his estray for such limited time as to said justice shall appear reasonable; but the only effect of such license shall be to protect the persons entering from indictment therefor, and then only, provided the license shall have been made *bona fide*, and without any damage except such as were necessary to conduct the search.

JUSTICE'S WARRANT.—A justice's warrant which fails to charge that defendant "unlawfully and wilfully" entered on the land after being forbidden, is fatally defective. Whitaker, 85—566.

A warrant will not be quashed because it does not contain the necessary descriptive words of the offence, when it refers to an "annexed affidavit" in which all the essential averments are made. Winslow, 95—649.

A justice's warrant which concludes "contrary to law" without using the words "against the form of the statute," is fatally defective. Lowder, 85—564.

A justice's warrant may be amended in the superior court to charge that the entry was "wilful and unlawful" and "against the peace and dignity of the state" even after verdict. Smith, 103—410.

VARIANCE.—Where the indictment charges a trespass on the lands of A, and the proof is that the lands were in the possession of B, the variance is fatal. Sherill, 81—550.

JURISDICTION.—Justices of the peace have exclusive original jurisdiction of the offence of entering on land after being forbidden. Dudley, 83—660.

EVIDENCE OF TITLE INCOMPETENT.—As forcible trespass is essentially an offence against the *possession* of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial for such offence. Webster, 121—586.

WHO MAY BE CONVICTED.—One who hauls cross-ties across a tract of land after having been forbidden to enter on the land is guilty, though he, in good faith, believed he had a right to do so as the agent of the railroad company, since the railroad company had no right to transport its cross-ties over the prosecutor's land, or to direct defendant to do so. The mere belief that one has a right to enter on land after having been forbidden is not sufficient to excuse unless there is reasonable ground for such belief. Fisher, 109—817.

The prosecutor sold a field to the lessor of defendant and permitted the use of a way for three years over his land to the field which was being cultivated by defendant, but withdrew such permission by notice forbidding further entry, there being another way over the lessor's land which adjoined a public road, though of greater distance to the field. Defendant entered after having been forbidden: *Held*, not to be error to refuse an instruction that if defendant *believed* he had a right to travel over the prosecutor's land because he and former tenants had done so for some time he would not be guilty. Bryson, 81—595.

One who enters land after being forbidden, pending an appeal from an adverse adjudication upon his title to the land, can have no reasonable ground for his belief in his right to enter. Glenn, 118—1194.

An alleged entry of public lands without survey or grant is insufficient ground upon which to base a claim of right to enter. Calloway, 119—864.

Defendant testified that he believed he had a right to follow an old road across the land in question, but admitted that the road had been blocked for 10 or 11 years by wires put up for that purpose: *Held*, that the defendant's evidence of a *bona fide* belief, being unsupported by any evidence of a reasonable ground for such belief, was immaterial. Durham, 121—546.

WHO MAY NOT BE CONVICTED.—Where defendant, after having been forbidden by a landlord to enter on his land, enters a part in the possession of a tenant upon the invitation of the tenant, he is not guilty of a wilful trespass. Lawson, 101—717.

One who enters on the land of another after having been forbidden, as

the servant, and at the command of the *bona fide* claimant, is not guilty. Winslow, 95—649.

One who enters on land in possession of another, after being forbidden to enter, claiming it as his, can not be convicted for a wilful trespass. Ellen, 68—281.

One who enters on land in the possession of another, after being forbidden to enter, under a warrant of survey, having made an entry believing the land to be vacant, is not guilty of a wilful trespass. Hanks, 66—612.

An employee of a railroad company, who, under the orders of the company, cuts trees on land conveyed by the owner for a right-of-way, can not be convicted for a wilful trespass by the original owner. Crossett, 81—579.

CLAIM OF RIGHT—BONA FIDE BELIEF.—It is not sufficient for defendant to show that he entered under a claim of right, but he must show reasonable grounds for such belief. Glenn, 118—1194.

A mere belief that defendant had a valid claim of title will not suffice; he must satisfy the jury that he made the claim in good faith, and had reasonable ground to believe that his claim was well founded. Crawley, 103—353.

It is incumbent on the state to prove the entry after being forbidden, but this being done the defendant must show a license or that he entered under a *bona fide* claim of right. Glenn, 118—1194.

It is not sufficient that defendant believed he had a right to enter, but he must go further and show that he had reasonable ground for such belief, and if he fails to do this the judge should instruct the jury that, if they believe the evidence, the defendant is guilty. Durham, 121—546.

Where the entry after being forbidden, is shown or admitted, the burden is on the defendant to show that he entered under a *bona fide* claim of right. Durham, 121—546.

Although the entry be peaceable, yet if after getting on the premises, defendant uses violent and abusive language, and threatens to strike, and does other acts calculated to and which do intimidate the owner, he is guilty. Wilson, 94—833.

COURT NOT REQUIRED TO SUBMIT A MERE ABSTRACTION.—Where a person is indicted for a wilful trespass on land, and in the proof there is no evidence of a *bona fide* claim of title, or no facts and circumstances showing that defendant could reasonably and in good faith have believed he had a right to do what he did, it is not the duty of the court to submit to the jury a mere abstract proposition as to defendant's belief that he had a right to enter. Bryson, 81—595.

Sec. 640 (1121). Trespass on public lands, penalty therefor. R. C., c. 34, s. 42. 1823, c. 1190. 1842, c. 36, s. 4.

If any person shall erect a building on any public lands, before the same shall have been sold or granted by the state, or on any lands belonging to the state board of education before the same shall have been sold and conveyed by them, or cultivate, or remove timber from, any of said lands, such person shall be guilty of a misdemeanor; and, when any person shall be in possession of any part of said land, it shall be the duty of the sheriff of the county in which the land is situated, and he is hereby required, to give notice in writing to such person, commanding him to depart there-

from forthwith; and if the person in possession, upon being so notified, shall not, within two weeks after the time of notice, remove therefrom, the sheriff is required to remove him immediately, and if necessary, shall summon the power of the county to assist him in so doing.

Sec. 641 (2828). Trespassing upon lands of another without permission; misdemeanor. 1889, cs. 118, 504.

If any person by riding or driving upon the lands of another without permission, or while driving live stock along any roadway, public or private, shall wilfully, deliberately or recklessly do, or permit to be done some actual injury to said lands, or to the crops or other property growing or being thereon, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Sec. 642 (2829). Wilful riding or driving of horses over cultivated lands, in stock-law territory; evidence. 1883, c. 391, ss. 1, 3 1885, c. 100.

Any person, who, in any stock-law territory, shall wilfully, and not as the result of an accident, ride any horse or mule, or drive any horse or mule, either loose or to any vehicle or wagon, over the cultivated or enclosed lands of another, shall be guilty of a misdemeanor, and upon conviction before any justice of the peace shall be fined not exceeding ten dollars, at the discretion of the court.

Sec 643 (2288). Trespass on boats a misdemeanor; penalty and damages, how recovered. R. C., c. 14, ss. 1, 3. 1889, c. 378.

Any person who shall take away from any landing or other place where the same shall be, or shall loose, unmoor or turn adrift from the same, any boat, canoe or pettiaugua, oars, paddles, sails and tackle, belonging to or in the lawful custody of any person; or any person who shall direct the same to be done without the consent of the owner, or the person having the custody of such boat, canoe or pettiaugua, shall forfeit and pay to such owner, or person having the custody and possession as aforesaid, the sum of two dollars; and the owner may have his action for such injury; and shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, in the discretion of the court. The penalties aforesaid shall not extend to any person who shall press any boat, canoe or pettiaugua by public authority.

NOTE.—The words "and shall be guilty of a misdemeanor," etc., which were inserted by the amendatory act of 1889, were evidently intended to be placed between the word "dollars" and the words "and the owner," so as to make the trespasser guilty of a misdemeanor instead of the owner of the boat, but we have placed the amendment where the act directs it to be placed.

TRIAL.

Sec. 644 (1198). Plea of "not guilty" entered for defendant who stands mute. R. C., c. 35, s. 29. R. S., c. 35, s. 16.

If any person, being arraigned upon or charged in any indictment for any crime, shall stand mute of malice or will not answer directly to the indictment, the court shall order the plea of "not guilty" to be entered on behalf of such person; and the plea so entered shall have the same force and effect as if such person had pleaded the same.

PLEA ENTERED AFTER VERDICT.—The plea of "not guilty" may be entered under the direction of the court, even after verdict of guilty, where the omission is from mere inadvertence. McMillan, 68—440.

AFTER CONTINUANCE.—Where a case is continued in the absence of defendant, without any plea entered, he is entitled, on his arraignment at a subsequent term, to plead in abatement, or to enter any other plea open to him at the former term. Jackson, 82—565.

AMENDMENT OF RECORD.—The court has authority to amend the record by inserting the plea of not guilty after the verdict, when the omission to enter such plea at the proper time was through mere inadvertence of the clerk. Farrar, 104—702.

Sec. 645 (1241). Concurrent jurisdiction of inferior and superior courts in certain criminal cases, with a view to a speedy trial of criminals. 1879, c. 302, s. 1.

Wherever in any county, inferior courts have been or shall hereafter be established, the said inferior court and the superior court of such county shall have equal power and jurisdiction to inquire of, try, hear and determine all criminal cases of which jurisdiction is given to said inferior courts, or of which jurisdiction may hereafter be given to them, whether such cases have been returned to the said superior court or to the said inferior court.

JURISDICTION IN SUPERIOR COURT, THOUGH DEFENDANT BOUND TO INFERIOR COURT.—Where an indictment, charging an offence of which the superior and inferior courts have concurrent jurisdiction, is first found in the superior court, that court retains jurisdiction of the offence, notwithstanding a bill for the same offence is afterwards found in the inferior court, and defendant was first bound over by a justice to appear before the inferior court. Williford, 91—529.

Sec. 646 (1242). Pending cases remaining untried to be transferred to succeeding court, whether inferior or superior. 1879, c. 302, s. 3.

All such cases pending in either the inferior or the superior court of any county which shall not have been tried and determined at any term of said inferior or superior court, shall be transferred by the clerk of such court to the next succeeding court, whether the same be an inferior or superior court, and shall be proceeded

in the same manner and with like power and jurisdiction to said court (to which they are transferred) to hear, try and determine as if the bill of indictment therein had been originally found by the grand jury of the same: *Provided*, that this section shall apply only to those cases in which the defendants or accused are confined in jail: *Provided further*, that in such cases the handing over of the papers by the clerk of one court to the clerk of the other court where the trial is to take place, and the docketing of the cases, with the receipt of the latter on the docket of the former, shall be deemed and held a sufficient transfer of any such case from one court to another.

TRANSFER AS TO ONE DEFENDANT, LEAVING OTHERS TO BE TRIED IN INFERIOR COURT.—Where three persons are indicted in the same bill, and two of them give bail for their appearance at the next term of the inferior court and the other is committed to jail in default of bail, it is not error to transfer the case of the one failing to give bail to the superior court, leaving the indictment pending in the inferior court as to the other two. Mott, 86—621.

RECEIPT FOR TRANSCRIPT.—An entry on the minutes of the inferior court, "transferred to the superior court," is a sufficient compliance with the requirement as to the receipt to be given, since the provision is merely directory. Mott, 86—621.

MISCELLANEOUS RULES OF PRACTICE.

RECAPITULATION OF TESTIMONY.—It is not necessary, in the absence of a special request, for the judge to recapitulate all the evidence in his charge to the jury, and if the defendant desires the entire testimony or any portion of it repeated to the jury he must make the request in apt time. If no such instruction is asked the failure to repeat the entire testimony is not error. Ussery, 118—1177.

Where the court omits evidence favorable to the defendant in his charge it is the duty of the defendant's counsel to call it to the attention of the court that the omission may be corrected; for, after verdict, an exception for such omission will not be sustained. Ussery, 118—1177.

APPEAL AFTER PLEA OF GUILTY.—Where a defendant pleads guilty, his appeal from a judgment thereon can not call into question the facts charged, nor the regularity and correctness of the proceedings, but brings up for review only the question whether the facts charged and admitted by the plea constitute an offence. Warren, 113—683.

SUBMISSION OF ONE DEFENDANT DURING TRIAL.—After the close of the testimony, and after one counsel had addressed the jury, there being a pause for a few minutes, a member of the bar who appeared for another person who was indicted in a separate bill for the same offence as defendant, rose and said he wished to enter a submission, without stating in what case. The court received the submission over the objection of defendant, when the counsel stated he wished to submit for the other defendant; that he had examined the evidence, and found his client certainly guilty, and that defendant was more guilty than he. The court promptly stopped the counsel, and told the jury that his statement was not evidence, and they must not consider it, and that he would not have allowed the remark if he could have prevented it. Defendant did not

ask for a mistrial at the time, nor after verdict move for a new trial: *Held*, that the reception of the submission was not reversible error. *Hunter*, 94—829.

SUSPENDED JUDGMENT BY JUSTICE.—Where judgment is suspended by a justice of the peace without the consent of the defendant, the defendant may appeal to the superior court and have a trial *de novo*. *Griffs*, 117—709.

APPEAL FROM INFERIOR TO SUPERIOR COURT.—No appeal lies from the inferior to the superior court from a judgment against defendant on his plea of former acquittal, but it is the duty of the inferior court in such case to proceed with the trial on the plea of not guilty. *Pollard*, 83—597.

A defendant who has been convicted in the inferior court is not entitled to a trial *de novo* before a jury on appeal to the superior court, but only to a review of the question of law passed upon by the inferior court, and on such appeal the appellant must present for the superior court a "case" made and settled in the same manner as an appeal from the superior to the supreme court. *Thompson*, 83—595.

VERDICT ENTERED IN ACCORDANCE WITH OPINION.—On a special verdict the court must say that in law the facts found constitute or do not constitute the offence charged, and thereupon the verdict must be entered in accordance with the opinion of the court. *Morris*, 104—837.

EFFECT OF SETTING ASIDE SPECIAL VERDICT.—Though the court may set aside a special verdict, it can not thereafter enter a general verdict of guilty or not guilty; that must be done by a new jury. *Moore*, 29 (7 *Ired.*), 228.

RECORD MUST SHOW PLEA.—Where a special verdict is taken, the record should show that defendant filed his plea; otherwise the verdict is a nullity, and no judgment can be pronounced. *Cunningham*, 94—824.

NO APPEAL FROM INTERLOCUTORY JUDGMENT—CERTIORARI.—While no appeal lies in state cases from an interlocutory order or judgment, yet where a matter involves the power of a superior court and error in its exercise, as where the judge improperly discharges a jury and refuses to discharge the prisoner, the record below may be brought up for review by a writ of *certiorari* in the nature of a writ of error. *Jefferson*, 66—309.

SENTENCE.—The court has no power to imprison a convict elsewhere than in the county jail, nor can it delegate to the county commissioners power to change the punishment imposed by the court to imprisonment in the workhouse of the county. *Norwood*, 93—578.

Where the court sentences defendant to a term of imprisonment, it can not also adjudge that he be confined in the county workhouse after the term of imprisonment expires until he pay the costs of the trial. *Ib.*

APPEAL BY SOLICITOR.—A solicitor has no right to appeal from a judgment taxing the costs against defendant. *Tyler*, 85—369.

CHARACTER OF DEFENDANT.—The court charged the jury that the state could not introduce evidence as to defendant's character, but it was the right of defendant to offer it if he chose, and he had not done so, but no unfavorable inference could be drawn from his failure to do so: *Held*, that though the first part of the charge was erroneous, the error was cured by the latter part. *Sanders*, 84—728.

PLEADING NOT GUILTY BY SEVERAL DEFENDANTS.—Defendants in an indictment have a right to plead severally not guilty; but a general plea of not guilty by all the defendants is, in law, a several plea. *Smith*, 24 (2 *Ired.*), 402.

GRADE OF OFFENCE CHANGED BY STATUTE.—Where the grade of a common law offence has been made higher by statute, the indictment must conclude against the statute, but when the punishment has been mitigated it may conclude at common law. Lawrence, 81—522.

INSTRUCTIONS MUST BE REQUESTED.—An omission to give an instruction is not ground for an exception in the absence of a request to so instruct. Varner, 115—744.

WITNESS COMPELLED TO INSPECT WRITING.—A witness may be compelled, at the instance of the party who is examining him, to inspect a writing which is present in court and in his own handwriting, or if it otherwise appear that by referring to it he can refresh his memory concerning the transaction to which it relates. Staton, 114—813.

JURY MAY VISIT SCENE.—The judge in his discretion may permit the jury to visit the scene of the *res gestae*, in criminal and civil cases, whenever such visit appears important for the elucidation of the evidence, but such visit must be carefully guarded to prevent conversation with third parties and no evidence must be taken. Perry, 121—533.

TRIAL OF SEVERAL—FIRST NAMED CALLED.—Where there are several defendants with separate and antagonistic defences, the court must regulate the order and manner in which the defences are presented, and the exercise of his discretion is not reviewable. The usual rule is to call first on the one whose name appears first in the bill. Dixon, 78—558.

ORDER OF ADMISSION OF TESTIMONY.—After the state has introduced its evidence to sustain the charge and the defendant has introduced his evidence, the state has only the right to introduce rebutting evidence and evidence strictly to strengthen and support that offered at first. After this, the admission of further evidence is a matter of discretion, and not reviewable except in case of abuse of power. Lemon, 92—790.

DISCHARGE OF JURY.—On the trial of a misdemeanor the court has the discretionary power to discharge the jury before they have rendered a verdict, and to require defendant to be again put on trial for the same offence. Morrison, 20 (3 D. & B.), 116.

EXCEPTION WHEN WHOLE CHARGE GIVEN.—Where the whole charge is set out an exception "to the instruction of the court as given," refers to the want of instruction, and is not objectionable as being a "broadside exception" because it presents only one proposition of law applicable to the whole charge. Fulford, 124—.

INSTRUCTIONS MUST BE ASKED.—A mere omission to charge on a particular aspect of the case is not ground for an exception unless an instruction is asked and refused. Groves, 119—822.

BAIL MAY BE REQUIRED WHEN BILL QUASHED.—When an indictment is quashed, it is competent and proper for the court to require the defendant to give bail to answer another indictment for the same offence. Griffee, 75—316.

WITHDRAWAL OF APPEAL.—Appeals in misdemeanors may be withdrawn by counsel for defendant, with consent of the attorney-general, but in felonies it must appear affirmatively that the prisoner advisedly assents to and desires the withdrawal of his appeal. Leak, 90—655.

After appeal to the supreme court, the appeal can not be withdrawn when the attorney-general opposes the application, and no good cause is shown why it should be granted. Brewer, 98—607.

CASE REMANDED WHEN JUSTICE IMPROPERLY BINDS OVER TO COURT.—Where a justice of the peace binds over a defendant to appear in the superior court to answer to a charge of which the justice has exclusive original

jurisdiction, the proper course is for the superior court to remand the case to the justice for trial. Sykes, 104—700.

DEPOSITIONS ADMISSIBLE IN A BASTARDY PROCEEDING.—Depositions are admissible in evidence on the trial of an issue in bastardy as they are in other civil cases. A proceeding in bastardy is purely a civil action. Hickerson, 72—421.

TRIAL OF ONE DEFENDANT WITHOUT THE OTHER.—On indictment for fornication and adultery, a trial may be had as to one of the defendants, though the other has not been taken. Lysterly, 52 (7 Jones), 158.

USING ONE AS WITNESS AGAINST THE OTHER.—On the trial of an indictment for fornication and adultery, the solicitor may enter a *not pros.* as to one of the defendants and use that one as a witness to prove the offence against the other. Phipps, 76—203.

ONE MAY BE PUNISHED AND THE OTHER GRANTED A NEW TRIAL.—Where, after conviction of both defendants of fornication and adultery on the confessions of the male defendant, the female is granted a new trial because such confessions were improperly received against her, the court may still pass judgment upon the male defendant. Parham, 50 (5 Jones), 416.

ASKING PRISONER IF HE HAS ANYTHING TO SAY WHY SENTENCE SHOULD NOT BE PASSED.—Where the prisoner moves for a new trial, and the motion is overruled, it is not absolutely essential that the court before passing sentence should ask whether the prisoner had anything to say why sentence of death should not be pronounced against him. Johnson, 67—55.

PRESENCE OF GRAND JURY IN COURT.—Where the record shows that the bill was returned into open court by the hands of the foreman of the grand jury, it sufficiently appears that the grand jurors were present in court, and the entry is a proper one. Starnes, 97—423.

ERRORS MUST BE SPECIFIED.—The court may require counsel to specify objections to testimony, or to point out defects in the record, and failure to comply with such request forfeits the right to insist upon an exception to the ruling of the court on the question. Hassell, 119—852.

REMOVING JURY FROM COURT-ROOM DURING TRIAL.—The judge may, in his discretion, remove the jury from the court-room while a proposition to introduce evidence is being debated. Ordinarily this is a matter of discretion, but its exercise under some circumstances may be reviewed. Moore, 104—743.

JUDGMENT MAY BE MODIFIED DURING THE TERM.—The court during the same term has power to modify its judgment by decreasing the punishment. Brittain, 93—587.

CONDITIONAL JUDGMENT.—A judgment imposing a fine, and in default of payment, imprisonment, is irregular and illegal, as being conditional and alternative. Perkins, 82—681.

A sentence to "pay a fine of \$40, and in default thereof be imprisoned thirty days," is erroneous. Alternative judgments are not allowed. Deaton, 105—59.

DENIAL OF MOTION NOT REVIEWABLE.—A motion, made in the court below, for a new trial on the ground of newly discovered evidence, may be denied in the discretion of the trial judge, and the exercise of such discretion is not reviewable. Morris, 109—.

REMOVAL FROM ONE COUNTY TO ANOTHER.—A case can not be removed from one county to another for trial before defendant has pleaded to the indictment. Swepson, 81—571.

A motion to remove to another county can not be made before defendant has pleaded. Haywood, 94—847.

EXPENSE OF GUARDING JAIL.—The expense of guarding the jail after conviction must be defrayed by the county from which the case was removed. *Justices of-Anson*, 33 (11 Ired.), 135.

REMOVAL TO FEDERAL COURT.—Rev. Stat. U. S., sec. 643, authorizing the removal of criminal prosecutions from a state court to a circuit court of the United States is constitutional, and where defendant in an indictment in the superior court for assault and battery makes affidavit that he was a revenue officer of the United States, and that the alleged offence was committed under color of his office, the proceeding in the superior court, on receipt of an order of removal from the circuit court, is properly stayed. *Rodman, J.*, dissenting. *Haskins*, 77—530.

It is not error for the superior court on motion of a defendant, who is a United States officer, in an indictment for a conspiracy to extort money, to order the removal of the cause to the federal court. Following *State v. Haskins*, 77—530. *Deaver*, 77—555.

TAMPERING WITH JURY.—The rejection of evidence offered to show that during the retirement of the jury some of them were improperly "approached and spoken to," being a matter of discretion with the trial judge, is not reviewable, especially when the exception does not indicate any fact to prove a tampering. *Harper*, 101—761.

MISTAKE IN VERDICT.—A mistake in the verdict may be corrected before it is recorded or the jury discharged. *Shelly*, 98—673.

WHEN OBJECTION TO SUFFICIENCY OF EVIDENCE MADE.—An objection to the sufficiency of the evidence to warrant a verdict must be made in proper manner before verdict, though the court in its discretion may grant a new trial if it has reason to believe injustice has been done, but from its refusal to do so there is no appeal. *Bradley*, 104—737.

FACTS SHOWING IMPROPER CONDUCT OF JURORS MUST BE SET OUT.—Where a motion is made to set aside a verdict on the ground of improper conduct in the jurors, the facts must be ascertained by the court below and spread on the record; the supreme court will not look into affidavits filed in support of the motion. *Godwin*, 27 (5 Ired.), 401.

VERDICT RENDERED ON SUNDAY.—A verdict rendered on Sunday is not invalid. *Penley*, 107—808.

CONFESSION OF ANOTHER'S GUILT.—Where two persons are jointly indicted for larceny, one of them may introduce witnesses to prove the confessions of the other that he alone is guilty. *Brite*, 73—26.

SPECIAL VERDICT.—The court must instruct the jury to render a verdict of guilty or not guilty according to the view entertained of the law applicable to the facts found, and *then* pronounce judgment. *Nies*, 107—820.

The fact that the jury specially found the facts and submitted them to the court for an opinion as to whether they should acquit or convict, and the court being of opinion that the defendants were not guilty thereon, so adjudged and directed a verdict of not guilty to be entered, does not constitute a general verdict of not guilty, but amounts to a *special* verdict, and from the judgment thereon the state can appeal. *Ewing*, 108—755.

Where a special verdict is taken the court should simply declare its opinion that the defendant is guilty or not guilty, and enter judgment accordingly; or the simple entry of judgment in favor of or against the defendant is sufficient. *Ewing*, 108—760.

RE-EXAMINATION OF WITNESS.—Upon disagreement of counsel as to facts testified to by a witness, it is not error in the court to have the witness re-examined. *Boon*, 82—637.

The judge, in his discretion, may permit a witness to be recalled after

the party has rested his case, or even after all the evidence has closed. Groves, 119—822.

VERDICT OF ACQUITTAL THROUGH FRAUD.—A verdict of acquittal on an indictment for a misdemeanor procured by the trick or fraud of the defendant is a nullity, and the defendant can again be put on trial for the same offence. Swepson, 79—632.

EFFECT OF CERTIORARI WHERE DEFENDANT IS ILLEGALLY SENTENCED—PRACTICE.—The granting of a writ of *certiorari* to bring up a case in which an illegal sentence has been pronounced against a defendant does not entitle him to his discharge on the ground that the effect of the *certiorari* is to give him a new trial and no person can be put twice in jeopardy of life or limb; but the practice in this state is to send the case back for such judgment as the law allows. Lawrence, 81—522.

HABEAS CORPUS AD SUBJICIENDUM.—Where a prisoner is in the penitentiary under an illegal sentence and his case is brought to the supreme court by *certiorari*, or otherwise, and the judgment corrected, the prisoner may be brought before the proper court below upon a writ of *habeas corpus ad subjiciendum* to the end that the proper judgment may be pronounced upon him according to law. Lawrence, 81—522.

REFUSAL OF WITNESS TO ANSWER DISPARAGING QUESTIONS.—Where the trial judge refuses to compel a witness to answer questions which tend to disparage or disgrace the witness, it being apparent that such questions are asked merely for the purpose of annoying and harassing him, the refusal of the witness to answer such questions is a legitimate subject of comment before the jury. Gay, 94—814.

WHEN DEFENDANT MAY BE AGAIN TRIED AFTER VERDICT OF ACQUITTAL.—Where a defendant indicted for a misdemeanor procures a verdict of acquittal by a trick or fraud the verdict is a nullity, and he may be again put on trial for the same offence. Swepson, 79—632.

PUNISHMENT OF ONE, THOUGH OTHERS NOT TAKEN.—Where, on indictment for a riot, one of several defendants is convicted, he may be punished though the others are not yet taken, for though the others may be acquitted, yet he is estopped by the verdict to deny his guilt. Pugh, 3 (2 Hay.), 55 (218).

REFUSING COMPENSATION TO WITNESS.—The action of the court in refusing to allow any compensation to witnesses is not reviewable. Massey, 104—877.

DISCHARGE OF JURY BEFORE VERDICT.—In misdemeanors and in all felonies not capital, the presiding judge has the discretion to discharge a jury before verdict without the consent of the accused, and it is not necessary for him to find facts constituting the necessity for such discharge. Bass, 82—570.

CIRCUMSTANTIAL EVIDENCE.—Where the evidence is circumstantial, the accused is not entitled to a charge that it must be as conclusive as if an eye-witness had testified to the fact. Allen, 103—433.

DIRECTING THE VERDICT.—After the conclusion of the evidence in a trial for murder, the judge asked the counsel for the prisoner what they had to say, to which counsel replied, "We shall take the ground that it was in self-defence." The judge answered, "It is manslaughter in any phase, with many elements of murder. I shall tell the jury to return a verdict of manslaughter;" and he so directed, and the verdict was recorded: *Held*, that such a charge was erroneous. The evidence must be submitted to the jury for them to say whether they believe or disbelieve it, even in a clear case of guilt. Dixon, 75—275.

Where there is no conflict of testimony and no alternative aspects of it

to be submitted, it is not error for the judge to tell the jury that *if they believe the evidence* the prisoner is guilty of manslaughter. *Distinguishing State v. Dixon*, 75—275. *Vines*, 93—493.

THE COURT MAY SET A VERDICT OF GUILTY ASIDE.—The court has the power to set aside a verdict of guilty when it is against the weight of evidence, or when there is no evidence. *Atkinson*, 93—519.

If the evidence produced is so slight and inconclusive as that, in no view of it, ought the jury reasonably to find a verdict of guilty, then there is no evidence which should be submitted to them. *Ib.*

WHERE NO EXCEPTION TO THE ADMISSION OF INCOMPETENT EVIDENCE NECESSARY.—Where certain evidence is made incompetent by statute, no exception to the admission of such evidence is necessary on the trial, but its admission is assignable for error though no objection was made; it is the duty of the judge, on his own motion, to disallow the evidence. *Ballard*, 79—627.

MISTAKE IN MAKING INDICTMENT "A TRUE BILL," HOW SHOWN.—If a bill of indictment be endorsed "a true bill" by mistake, when the grand jury had directed their clerk to endorse it "not a true bill," the defendant may show that fact by affidavit or otherwise, either upon a motion to quash or plea in abatement, and thereupon the indictment shall be quashed. *Horton*, 63—595.

VERDICT OF GUILTY CAN NOT BE SET ASIDE.—The court can not set aside a verdict of guilty and direct a judgment of acquittal, but must either pronounce judgment on the verdict as returned or grant a new trial. *Curtis*, 28 (6 Ired.), 247.

VERDICT MAY BE CORRECTED.—Where, on the rendition of a verdict, and before it is recorded, it is seen that there was a mistake and misapprehension of the jury, it is proper for the court to explain to them their duties in regard to their verdict and have them to return to correct it.—*Shelly*, 98—673.

RES ADJUDICATA.—Where, upon a mistrial, the defendant moves for his discharge, which motion is refused, and he is required to give bail for his appearance at the next term, the judge presiding at next term has no right to entertain the motion and discharge the defendant. It is *res adjudicata*. *Evans*, 75—324.

WHEN OPINION CERTIFIED.—The supreme court may direct an opinion to be certified down in advance of the statutory time. *Herndon*, 107—934.

ORDER MADE AFTER EXPIRATION OF TERM.—A judge has no power to make any order in a criminal action after the expiration of the term. *Alphin*, 81—566.

SENTENCE, WHEN IT TAKES EFFECT.—One who is sentenced to imprisonment for two months "from and after the first day of November next," may, after the expiration of that time and at a subsequent term of the court, the sentence not having been complied with, be ordered to prison for two months from that time, since the time when a sentence shall be carried into execution forms no part of the judgment of the court. *Cock-erham*, 24 (2 Ired.), 204.

GENERAL VERDICT WHEN ERROR AS TO ONE COUNT.—Where there are two counts and a general verdict of guilty, the judgment will be sustained, even though there was error in the instructions as to one, provided the other was unexceptionable. *Robbins*, 123—730.

COMMITMENT OF DEFENDANT.—An order that a defendant be placed in custody of the sheriff until the fine and costs are paid is a commitment until the fine and costs are paid, or, with the sanction of the court, secured. *Burton*, 113—655.

AMENDMENT OF RECORD.—Where the record in the trial of an action on an appearance bond did not show that a judgment *nisi* had been entered against the principal in the superior court, it was not error for the court, on ascertaining that such judgment had been taken, to require the record to be amended so as to show that fact. Jenkins, 121—637.

Where defendant, who was under bond to appear before a justice of the peace, failed to appear, and the justice caused him to be called and entered the default on the docket, but failed to enter it on the bond as required by chapter 133, laws of 1889, it was not error, in the trial of an action on the bond, for the court to require the justice, who was present, to make the proper entry on the bond of defendant's default, such direction being merely for the purpose of perfecting the record. Jenkins, 121—637.

ERROR MUST BE POINTED OUT.—An exception to the whole charge that it presented the case in a manner to prejudice the defendant should have pointed out in what particular harm was done. Varner, 115—744.

An assignment of error that the court refused to charge as requested will not be considered where the record does not show that any instructions were asked. Hart, 116—976.

TRIAL BY JURY.

JURY TRIAL CAN NOT BE WAIVED.—A jury trial can not be waived in a criminal action, and where the facts are agreed upon by the state and the accused and submitted to the judge for his decision, there is no conviction, though the judge finds defendant guilty on the facts. Holt, 90—749.

A trial by jury in a criminal action can not be waived by the accused and the court allowed to find the facts. Such action is in violation of Const. N. C., art. 1, sec. 13, which provides that "no person shall be convicted of any crime *but by the unanimous verdict of a jury* of good and lawful men in open court." Stewart, 89—563.

WHEN JURY REQUIRED.—When the determination of the question as to whether there is a variance depends upon an issue of fact, it must be passed on by the jury, with instructions from the court as to the law. Green, 100—413.

CASE AGREED.—The court has no right to hear and decide a criminal action upon a statement of facts agreed upon by the state and the accused and submitted to the judge for his decision, such statement not being submitted in the shape of a special verdict. Holt, 90—749.

MUST BE TWELVE JURORS—NO WAIVER.—A less number than twelve is not a lawful jury, and a trial by jury in a criminal action can not be waived by the accused. Scruggs, 115—805.

Where, after empannelling the jury and the beginning of the testimony, a juror became too ill to continue as such, and the defendant offered to proceed with eleven men, or to select another juror either from the special venire, which had not been exhausted but had been discharged, or from the bystanders, and the solicitor declined all the suggestions, it was the duty of the judge to direct a mistrial and hold the prisoner. Scruggs, 115—805.

TRIAL BY JURY—CONSTITUTION.—The guaranty of a trial by jury in the sixth and seventh amendments to the constitution of the United States applies only to the federal courts, and is not a restriction on the states, which may provide for the trial of criminal and civil cases in their own courts, with or without jury, as authorized by the state constitution. Whitaker, 114—818.

Under article 1, section 13, of the constitution of this state the legislature may provide for the trial of petty misdemeanors in inferior courts without a jury, provided the right of appeal is preserved. Whitaker, 114—819.

TROUT.

Sec. 647 (1122). Trout, unlawful to catch mountain trout with seine at all times; the taking by shooting or otherwise between the fifteenth day of October and the thirtieth day of December, a misdemeanor. 1869-'70, c. 142.

It shall be unlawful to catch mountain trout by seining at all times. And there shall be no taking of said fish by shooting, or otherwise, between the fifteenth day of October and the thirtieth day of December. Any person violating this section shall be guilty of a misdemeanor. One-half of the fine shall be paid over to the informant, and the other to the county treasurer for the use of the free public schools therein.

TRUSTS.

Sec. 648. Trusts and combinations forbidden. 1889, c. 374.

All combinations and trusts as defined by this act are unlawful, dangerous to the liberty of the people, and are hereby forbidden to be formed or carried on in this state.

A trust is an arrangement, understanding or agreement, either private or public, entered into by two or more persons or corporations for the purpose of increasing or reducing the price of the shares or stock of any company or corporation, or of any class of products, materials or manufactured articles, beyond the price that would be fixed by the natural demand for or the supply of such shares, products, materials or manufactured articles; and any attempt to carry out such purpose shall be evidence that such arrangement, understanding or agreement exists.

Any persons, company or corporation who shall form, or attempt to form, a trust in this state, or the agent or representative of any trust in any state or county, who shall attempt to carry on operations in this state, shall be guilty of a misdemeanor, and upon

conviction may be fined not more than ten thousand dollars or may be imprisoned not more than ten years for each offence.

Any person, company or corporation who enter into an arrangement, understanding or agreement not to mine, manufacture, buy, sell or transport more than a certain specified amount of any goods, products or commodities within a specified time, will have violated section three of this act and will be liable to indictment therefor; and any person, company or corporation who give bond or make a forfeit of any kind not to break such arrangement, understanding or agreement shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned, or both, in the discretion of the court.

Any merchant, broker, manufacturer or dealers in raw materials of any kind, or the agent of such persons, who shall sell any particular class of goods, raw materials, or manufactured articles for less than actual cost for the purpose of breaking down competitors shall be guilty of a misdemeanor, and upon conviction may be fined or imprisoned, or both, in the discretion of the court: *Provided*, that nothing contained in this act shall operate or be construed so as to forbid or prevent any person or persons who desire and intend to purchase any article or commodity for his or their own use or consumption, from combining or otherwise lawfully acting so as to protect or help themselves from imposition in the cost or purchase-price of such articles or commodities as they or either of them may design and intend to use or consume.

TURPENTINE.

For leases of turpentine trees see LANDLORD AND TENANT.

Sec. 649. Unlawful to adulterate turpentine. 1897, c. 482.

Whereas, the practice of adulterating spirits turpentine by the addition of kerosene oil has become so general that the production is greatly increased; and

Whereas, the said increase in the product depreciates the price to the manifest injury of the laborer in the turpentine forest and the honest distiller, and at the same time increases the consumption and adds to the price and profits of the rich oil monopolies by an abnormal use and demand for the said oil; now, therefore,

SECTION 1. Any person or persons, who shall adulterate or cause to be adulterated, any spirits turpentine, or who shall knowingly sell or offer for sale as pure spirits turpentine, any adulterated spirits turpentine, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars, or imprisoned for thirty days, or both, at the discretion of the court, for each and every offence.

UNLAWFUL ASSEMBLY.

See RIOT.

UNLAWFUL FENCE.

See STOCK LAW AND FENCES.

UNWHOLESOME PROVISIONS.

See also ADULTERATION OF FOOD.

To support an indictment for knowingly selling unwholesome provisions, the provisions sold must be in such a state as that, if eaten, they would by their noxious, unwholesome and deleterious qualities have affected the health of those who were to have consumed them, and a charge that if they were unfit to be eaten according to the usages of a decent and Christian people, defendant was guilty, is too broad. Norton, 20 (2 Ired.), 40.

It is not necessary that defendant should be a trader in the article sold. Smith, 10 (3 Hawks), 378.

Selling unwholesome provisions not fit to be eaten by man is an offence at common law. Smith 10 (3 Hawks.), 378.

VAGRANCY.

See TRAMPS AND VAGRANTS.

VARIANCE.

See each particular subject for instances occurring applicable to such subject.

What amounts to a variance is a question of law, and the facts being admitted or proven, must be determined by the court. Green, 100—419.

When the determination of the question as to whether there is a variance depends upon an issue of fact it must be passed on by the jury, with instructions from the court as to the law. Green, 100—419.

VENUE.

Sec. 650 (1193). Crimes committed on waters dividing counties, where tried. R. C., c. 35, s. 24.

When any offence shall be committed on any water, or water-course, whether at high or low water, which said water or water-course, or the sides or shores thereof, shall divide counties, such offence may be dealt with, inquired of, tried and determined, and punished at the discretion of the court, in either of the two counties which may be nearest to the place where the offence was committed.

Sec. 651 (1194). Improper venue to be taken advantage of by plea in abatement; on issue joined, what judgment rendered in misdemeanors, what in felonies. R. C., c. 35, s. 25.

And because the boundaries of many counties are either undetermined, or unknown, by reason whereof high offences go unpunished; therefore, for the more effectual prosecution of offences committed on land, near the boundaries of counties, in the prosecution of all offences it shall be deemed and taken as true, that the offence was committed in the county, in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by a plea in abatement, the truth whereof shall be duly verified on oath, or otherwise, both as to substance and fact, wherein shall be set forth the proper county in which the supposed offence, if any, was committed; whereupon the court may, on motion of the state, commit the defendant, who may enter into recognizance, as in other cases, to answer the offence in the county averred by his plea to be the proper county; and, on his prosecution in that county, it shall be deemed, conclusively, to be the proper county. But if

the state, upon the plea aforesaid, will join issue, and the matter be found for the defendant, he shall be required to enter into recognizance as in other cases to answer the offence in the county averred by his plea to be the proper county, provided the offence be bailable; and, if not bailable, he shall be committed for trial in the county; and, if it be found for the state, the court in all offences and misdemeanors shall proceed to pronounce judgment against the defendant, as upon conviction; and, in all cases of felony, the defendant shall be at liberty to plead to the indictment, and be tried on his plea of not guilty.

PLEA WHEN OFFENCE COMMITTED IN ANOTHER STATE.—The special plea in abatement required by this section only applies to offences committed within this state but in a county other than that alleged in the bill, and where the offence charged has been committed in another state that fact can be proved under a plea of not guilty. Mitchell, 83—674.

NOT NECESSARY FOR STATE TO PROVE VENUE.—The allegation, on indictment for murder, that the killing took place in the county where the indictment is found need not be proven by the state, since it is to be taken as true unless the prisoner denies it by plea in abatement. Outerbridge, 82—617.

IMPROPER VENUE.—The failure to lay the venue properly is not fatal to an indictment. Williamson, 81—540.

Sec. 652 (1196). In cases where an assault followed by death in another county, indictment to be found in the county where assault was made. R. C., c. 35, s. 27. 1831, c. 22, s. 1.

In all cases of felonious homicide, when the assault shall have been made in one county within the state, and the person assaulted shall die in any other county thereof, the offender shall be indicted and punished for the crime in the county wherein the assault was made.

Sec 653 (1197). Assault in this state and death out of it, trial to be held in this state R. C., c. 35, s. 28. 1831, c. 22, s. 2. 1891, c. 68.

In all cases of felonious homicide, when the assault shall have been made within this state, and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes as if the person assaulted had died within the limits of the state, and if a mortal wound is given or other violence or injury inflicted, or poison is administered on the high seas or land, either within or without the limits of this state, by means whereof death ensues in any county thereof, said offence may be prosecuted and punished in the county where the death happens.

This act is constitutional, and applies to foreigners as well as citizens of this state who have inflicted mortal wounds elsewhere. *Caldwell*, 115—794.

The term "assault" as used in this statute means not a mere *attempt*, but an injury inflicted in this state and resulting in death in another state. *Hall*, 114—909.

VERDICT.

VERDICT DIRECTED BY THE COURT.—On a trial for murder the judge, at the close of the evidence, asked counsel for the prisoner what they had to say, to which the counsel replied, "We shall take the ground that it was in self-defence." The judge answered, "It is manslaughter in any phase, with many elements of murder. I shall tell the jury to return a verdict of manslaughter": and he so directed, and the verdict was recorded: *Held*, that such a charge was erroneous. The evidence must be submitted to the jury for them to say whether they believe it, even in a clear case of guilt. *Dixon*, 75—275.

Where there is no conflict of testimony and no alternative aspects of it to be submitted, it is not error for the trial judge to tell the jury that if they believe the evidence the prisoner is guilty of manslaughter. Distinguishing *State v. Dixon*, 75—275. *Vines*, 93—493.

The evidence for the state was uncontradicted, and the court instructed the jury that if they believed the evidence to return a verdict of guilty; and after pausing a moment or two, and the jury manifesting no disposition to retire, the court directed the clerk to enter the verdict of guilty: *Held*, that while it was not necessary that the jury should retire, yet it was indispensable that they should agree and render the verdict. *Riley*, 113—648.

The judge can not direct a verdict on the testimony for the jury must pass upon the credibility of the testimony offered. *Winchester*, 113—641.

SPECIAL VERDICT.—Where a special verdict is rendered, the court should simply declare its opinion that the defendant is guilty or not guilty and enter judgment accordingly; or the simple entry of judgment in favor of or against the defendant would be sufficient. Following *State v. Moore*, 29 (7 Ired.), 228. *Ewing*, 108—755.

A special verdict is in itself a verdict of guilty or not guilty, as the facts found in it do or do not constitute in law the offence charged; and there is nothing to do on it but to write a judgment thereon for or against the accused. *Moore*, 29 (7 Ired.), 228.

Upon the finding of fact as returned, the court should instruct the jury to render a verdict of guilty or not guilty, according to the view he entertains of the law applicable to such state of facts. To assume to pass judgment without directing a verdict to be entered up in accordance with its opinion on the law is error. *Nels*, 107—820.

A formal verdict in accordance with the opinion of the court must be entered upon a special verdict before judgment can be pronounced. *Morris*, 104—837.

A jury trial can not be waived in a criminal action and the court allowed to find the facts and declare the law by consent. Such action is

in violation of the constitution and in subversion of a fundamental principle of the common law. *Stewart*, 89—563.

A statement of facts agreed upon by the state and the accused and submitted to the judge for his decision, such statement not being submitted in the shape of a special verdict, will not warrant a judgment thereon. "No person shall be convicted of any crime but by the unanimous verdict of a jury." *Const. N. C.*, art. 1, sec. 13. *Holt*, 90—749.

Where the jury return a special verdict finding all the facts necessary to constitute the offence charged, the fact that the court, upon the special findings of fact, adjudges the defendant not guilty and orders "a verdict of not guilty to be entered," does not deprive the state of an appeal, as where a verdict of not guilty is returned by the jury. The entry of the verdict of "not guilty" is not the verdict of the jury, and such order of the court is unnecessary. *Ewing*, 108—755.

A judgment on a special verdict leaves the matter distinctly open to review in a higher court, and the reason for allowing such verdicts in criminal cases is to give the state, as well as the prisoner, the right to have the question of law solemnly decided. *Moore*, 29 (7 *Ired.*), 228.

A special verdict in which, after setting out the facts, the jury say: "If upon these facts the court be of opinion that the defendant is guilty, the jury so find, otherwise not guilty," is sufficient as following approved precedents. *Gillikin*, 114—832.

Where, in a bastardy proceeding, the justice found that, as the result of illicit intercourse between the defendant and the prosecutrix, the latter was delivered of a child eight months after such intercourse, which was living at the time of the trial, and that he, the trial justice, did not believe that an eight months child could live, and on these findings adjudged the defendant not guilty: *Held*, that such findings do not constitute a special verdict. *Bruce*, 122—1040.

It is not necessary to enter a formal verdict in accordance with the opinion of the court on a special verdict. *Spray*, 113—686.

Where the court sets aside a special verdict, it can not then order a general verdict of guilty or not guilty to be entered; the effect is to make a mistrial. *Moore*, 29 (7 *Ired.*), 228.

A special verdict which simply finds a certain state of facts, without a formal verdict of guilty or not guilty in accordance with the opinion of the court upon the facts found, is incomplete, and will not support a judgment. *Moore*, 107—770. *Monger*, 107—771.

Where a special verdict is returned which is so defective that no judgment can be pronounced upon it, the supreme court will order a new trial. *Lowry*, 74—121.

A mistake in the verdict of a jury may be corrected before it is recorded and the jury discharged. *Shelly*, 98—673.

A special verdict must find all the facts necessary to constitute the offence charged, and such facts should be fully and explicitly stated to warrant the court in pronouncing judgment upon the verdict. *Bloodworth*, 94—918.

SEPARATE VERDICT ON EACH COUNT.—Where there are several counts in an indictment, a defendant has the right to require a separate verdict to be rendered on each count; but this is a privilege, and if he does not ask to have this done in apt time he can not afterwards be heard to complain. *Toole*, 106—736.

While a defendant has the right to require a separate verdict on each count, yet he waives the right to insist on such verdict if not asked for in

apt time; and where some of the counts are defective, if he fails to ask for a separate verdict, a general verdict of guilty will support the judgment, though he has pointed out errors of the judge, to which he excepted in apt time, either in the refusal to admit competent testimony offered, or the admission of incompetent testimony objected to bearing on the good counts, or in giving objectionable instructions as to the good counts. *Avery and Shepherd, JJ., dissenting. Toole, 106—736.*

Where there is a general verdict of guilty on an indictment containing several counts, and only one sentence is imposed, if some of the counts are defective the judgment will be supported by the good count. *Toole, 106—736.*

Where there are two counts in an indictment, one good and the other defective, and there is a general verdict against the defendants, the judgment will be presumed to have been upon the good count alone; but where both counts are good and the court gives erroneous instructions to the jury as to one of the counts, it is presumed that the judgment was given upon both counts, and a *venire de novo* will be awarded. *McCauless, 31 (9 Ired.), 375.*

Where there is a general verdict of guilty on an indictment containing several counts, and some of the counts are defective, if the verdict as to any of the counts is subject to objection for the admission of improper testimony or erroneous instruction, the sentence will be supported by the verdict on the other counts, unless the error was such as might or could have affected the verdict on the good counts. *Overruling State v. McCauless, 31 (9 Ired.), 375. Avery and Shepherd, JJ., dissenting. Toole, 106—736.*

PRACTICE ON APPEAL.—The supreme court will not look into affidavits in support of a motion to set aside a verdict for misconduct of the jury, but will look only to the record presented, and when such motion is designed to be submitted to their revision, the facts must be ascertained by the court and spread upon the record. *Godwin, 27 (5 Ired.), 401. Smallwood, 78—560.*

IMPEACHING THE VERDICT.—A juror is incompetent as a witness to impeach the verdict of the jury of which he was a member. *Brittain, 89—481.*

A verdict can not be impeached for misconduct of the jury by evidence proceeding from members of the body. *Best, 111—638.*

The verdict of a jury can not be impeached by one of its members. *Royall, 90—755. Smallwood, 78—560. Brittain, 89—481.*

VERDICT OF GUILTY MAY BE SET ASIDE.—The court may set aside a verdict of guilty where it is against the weight of evidence, or where there is no evidence to support it. *Atkinson, 93—519.*

If the evidence is so slight and inconclusive as that, in no view of it, the jury ought reasonably to find a verdict of guilty, then there is no evidence which should be submitted. *Ibid.*

SUNDAY.—A verdict may be rendered on Sunday. *Penley, 107—808.*

VERDICT OF NOT GUILTY CAN NOT BE SET ASIDE.—The judge can not set aside a verdict of not guilty, nor grant a new trial after such verdict on the motion of the state, on the ground that one of the jurors had been improperly sworn. *Freeman, 66—647.*

NON-RESIDENT JUROR.—The fact that one of the jurors was a non-resident of the county is no ground for a new trial after the verdict is rendered. *White, 68—158.*

VERDICT OF ACQUITTAL BY FRAUD A NULLITY.—A verdict of acquittal on an indictment for a misdemeanor procured by the trick or fraud of the

defendant is a nullity, and the defendant can again be put on trial for the same offence. Swepson, 79—632.

VERDICT OF NOT GUILTY CAN NOT BE CHANGED.—Where, on indictment for horse-stealing, the jury return as their verdict that the defendant is “not guilty of the felony and horse-stealing, but guilty of a trespass,” and the court directs them to reconsider their verdict and say guilty or not guilty, and no more, and the jury then return a general verdict of guilty, it is proper to still have the first verdict recorded and the defendant discharged. Arrington, 7 (3 Murph.), 571.

INFORMAL OR INSENSIBLE VERDICT.—Where the jury return an informal or insensible verdict, or one that is not responsive to the issues involved, they may be directed by the court to reconsider it. Arrington, 7 (3 Murph.), 571.

VERDICT FOR MINOR OFFENCE.—On indictment for a felony, the jury can not return a verdict of guilty of a minor offence included in the felony, if such minor offence be a misdemeanor, as an acquittal of a felony is no bar to another indictment for the same act changing it to a misdemeanor. Durham, 72—447.

WHEN VERDICT RECONSIDERED.—It is the duty of the court to look after the form and substance of a verdict, and if it be informal or insensible to direct the jury to reconsider it. Whitaker, 89—472.

Where an informal or insensible verdict is returned, or one that is not responsive to the issues submitted to the jury, the proper practice is for the court to set the verdict aside and order a *venire de novo*. Edmund, 15 (4 Dev.), 340. Whitaker, 89—472.

PROPER FORM MAY BE SUBSTITUTED.—While the verdict of a jury must be recorded substantially as rendered, it is the duty of the judge to see it put in proper form; and, therefore, a new trial will not be granted because the clerk, on the return of a general verdict of guilty on an indictment for burglary, recorded the verdict not in the words of the jury, but in the form given in a form-book, when the verdict as recorded was read to the jury and assented to as their verdict. Wincroft, 76—38.

ARREST OF JUDGMENT ON IRRESPONSIVE VERDICT.—An absurd and irresponsible verdict should never be recorded, but the jury should be directed to correct it so as to be in conformity to law and to present an intelligent record. Where, on indictment for assault and battery in the usual form, the jury returned a verdict of “guilty of shooting,” the judgment was ordered arrested. Hudson, 74—246.

VERDICT RENDERED IN DEFENDANT'S ABSENCE.—A verdict of guilty rendered, in the absence of the defendant and his counsel, to a judge at his chambers, and entered on the record next day in the absence of the jury and the defendant, can not be sustained. Bray, 67—283.

Where the verdict, on indictment for larceny, is rendered to the clerk during the recess of the court, in the absence of the defendant and without his consent, and without any instruction from the court, judgment may be arrested, or the court even, *ex mero motu*, may set the verdict aside. Epps, 76—55.

VESSELS AND BUOYS.

Sec. 654 (3085). Unlawful to moor vessel to buoy, etc., or to damage, etc.; misdemeanor. 1858-'9, c. 58. ss. 2, 3. 1883, c. 165, s. 1.

Any person who shall moor any vessel of any kind or name whatsoever, or any raft or any part of a raft, to any buoy, beacon or day mark, placed in the waters of North Carolina by the authority of the United States light-house board, or shall in any manner hang on with any vessel or raft, or part of a raft, to any such buoy, beacon or day mark, or shall wilfully remove, damage or destroy any such buoy, beacon or day mark, or shall cut down, remove, damage or destroy any beacon erected on land in this state by the authority of the United States light-house board, or through unavoidable accident run down, drag from its position or in any way injure any buoy, beacon or day mark, as aforesaid, and shall fail to give notice as soon as practicable of having done so, to the light-house inspector of the district in which said buoy, beacon or day mark may be located, or to the collector of the port, or if in charge of a pilot, to the collector of the port from which he comes, shall for every such offence be guilty of a misdemeanor and punishable by a fine not exceeding two hundred dollars or imprisoned not to exceed three months, or both, at the discretion of the court.

Sec. 655 (3086). Unlawful for vessels to anchor in range line of lights, etc.; misdemeanor. 1883, c. 165, s. 2.

It shall be unlawful for any vessel to anchor on the range line of any range of lights established by the United States light-house board, unless such anchorage is unavoidable, and the master of any vessel so anchoring shall be guilty of a misdemeanor, and punished by a fine not to exceed fifty dollars.

Sec. 656 (3087). Due diligence to be exercised in passing buoys, etc.; misdemeanor. 1883, c. 165, s. 3.

Any person having charge of any raft passing any buoy, beacon or day mark, who shall not exercise due diligence in keeping clear of it, or in unavoidably fouling it, shall not exercise due diligence in clearing it, without dragging from its position such buoy, beacon or day mark, shall be guilty of a misdemeanor, and punished by fine not to exceed fifty dollars.

VOTING.

See ILLEGAL VOTING—REGISTRATION OF VOTERS.

WANTON—DEFINITION OF.

The illegal act is wanton when it is needless for any rightful purpose, without adequate legal provocation, and manifests a reckless indifference to the interests and rights of others. Brigman, 94—888.

WATERCOURSES.

Sec. 657 (1123). Watercourses, obstruction of, penalty. 1872-'3, c. 107, ss. 1, 2.

If any person shall wilfully fell any tree, or wilfully put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, and whereby the navigation of such stream by any raft or flat may be impeded, delayed or prevented, the person so offending shall be guilty of a misdemeanor, and fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. Nothing in this section shall prevent the erection of fish dams or hedges which do not extend across more than two-thirds of the width of any stream where erected, but if extending over more than two-thirds of the width of any stream, the said penalties shall attach.

WATERWAY ACROSS STREET.—The mere obstruction of a waterway across a street does not *per se* constitute a nuisance, and a judgment quashing a warrant for the violation of a town ordinance prohibiting the obstruction of a waterway across a street on the ground that the ordinance is invalid because the offence of creating a nuisance is cognizable under the general law of the state, is erroneous when the allegation is simply that defendant "did dam up and obstruct the waterway," since it does not appear but that the obstruction is too slight, occasional and temporary to constitute a nuisance. Wilson, 106—718.

NAVIGABLE WATERS.—The public has an easement of navigation in all navigable waters, though the bed of the lake or watercourse may be private property, and the owner of the soil is indictable for obstructing them. Distinguishing *State v. Glenn*, 7 Jones, 321, where the river was ascertained to be unnavigable. *Narrows Island Club*, 100—477.

INDICTMENT.—The indictment under this section should aver that the obstruction charged was not "for the purpose of utilizing the water as a motive power." *Narrows Island Club*, 100—477.

An indictment must negative the fact that the obstructions were placed in the stream "for the purpose of utilizing the water as a motive power." Tomlinson, 77—528.

RECITING STATUTE IN INDICTMENT.—An act making it indictable to fell timber in the channel of a particular creek in a particular county is a

public law, and need not be recited in an indictment under it. Cobb, 18 (1 D. & B.), 115.

TEST OF NAVIGABILITY.—The test of the navigability of a stream is whether it is navigable for sea-going vessels, and not whether it is subject to the ebb and flow of the tides. Eason, 114—787.

WEIGHTS AND MEASURES.

See MILLS.

WILFUL—MEANING OF.

The word "wilful" when used in a statute creating an offence implies the doing of the act purposely and deliberately in violation of law. Whitener, 93—590.

WILFUL TRESPASS.

See TRESPASS.

WIRE FENCES.

See also INJURY TO PROPERTY—STOCK LAW AND FENCES.

Sec. 658. Misdemeanor to injure wire fence on the lands of another. 1889, c. 516.

Any person who shall wilfully destroy, cut or injure any part of a wire fence, situated on the land of another, shall be guilty of a misdemeanor, and upon conviction thereof shall be imprisoned not exceeding thirty days or fined not exceeding fifty dollars. A fence composed partly of wire and partly of wood shall, for the purpose of this act, be deemed and taken to be a wire fence.

INDICTMENT.—An indictment under this section need not aver that the fence surrounded or enclosed any field or other premises. Biggers, 108—760.

JURISDICTION.—The indictment charged that defendant did cut and destroy "a wire fence enclosing a pasture," and it appeared that the offence was committed in May, 1889, and the indictment was found at fall term 1889: *Held*, that the superior court had jurisdiction of the offence under section 268 (The Code, sec. 1062), since the indictment charged the injuring of a wire fence "*enclosing a pasture*," and the state was bound to prove that the fence did enclose a pasture, while under this section no such averment is necessary, though an indictment under it would lie in a case where the wire fence in fact surrounded a field or pasture. The two statutes not being in conflict it was not necessary that the indictment should refer to the statute under which it was found so as to show jurisdiction. Biggers, 108—760.

THIS STATUTE DOES NOT REPEAL SECTION 268.—There is no conflict between this section and section 273 (The Code, sec. 1062), and an indictment for cutting and destroying "a wire fence enclosing a pasture" may be sustained under section 273. Biggers, 108—760.

WITNESSES.

Sec. 659 (739). Witnesses and officials to be paid half fees in certain cases, exception. R. C., c. 26, s. 8. R. S., c. 28, s. 12. C. C. P., s. 561. 1874-'5, c. 247, s. 1.

If there be no prosecutor in a criminal action, and the defendant shall be acquitted, or convicted and unable to pay the costs, or a *nolle prosequi* be entered or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees only; except in capital felonies and in prosecutions for forgery, perjury and conspiracy, when they shall receive full fees.

Sec. 660 (740). Witnesses for state when paid by county. R. C., c. 28, s. 9. 1804, c. 665. ss. 1, 2, 3. 1819, c. 1008. 1824, c. 1253.

Witnesses summoned or recognized on behalf of the state to attend on any criminal prosecution in the superior, inferior, or criminal courts where the defendant is insolvent, or by law shall not be bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence in behalf of the state, and the defendant shall be discharged, and in cases where the defendant shall break jail and shall not afterwards be retaken, the court shall order the witnesses to be paid.

Sec. 661 (743). When witness before grand jury to be paid for attendance. 1879, c. 264, s. 1.

No witness shall receive pay for attendance in a criminal case before a grand jury unless such witness shall have been summoned by direction in writing of the foreman of the grand jury, or of the solicitor prosecuting, addressed to the clerk of the court, commanding him to summon such witness, stating the name or names of the parties against whom his or her testimony may be needed, or shall have been bound or recognized by some justice of the peace to appear before the grand jury.

Sec. 662 (744). When witness on the trial of criminal action to be paid; not more than two witnesses to be paid. 1871-'2, c. 186, s. 3. 1879, c. 264, s. 2.

No person shall receive pay as a witness for the state on the trial of any criminal action unless such person shall have been summoned by the clerk under the direction of the solicitor prosecuting in the court in which the action originated, or in which it shall be tried if removed; and no solicitor shall direct that more than two witnesses shall be summoned for the state in any prosecution for a misdemeanor, nor shall any county or defendant in any such prosecution be liable for or taxed with the fees of more than two witnesses, unless the court, upon satisfactory reasons appearing, shall otherwise direct. And no witness summoned in a criminal action or proceeding shall be paid by the county for attendance in more than one case for any one day; nor shall the county be required to pay any such witness if his attendance shall be taxed in more than one case on the same day.

Sec. 663 (745). On appeal from justice only two witnesses to be bound over. 1879, c. 264, s. 3.

When the defendant shall appeal from the judgment of the justice of the peace in any criminal action, it shall be the duty of such justice of the peace to select and bind over on behalf of the state not more than two witnesses, and neither the county nor the defendant shall be liable for the fees of more than two witnesses on such appeal, unless additional witnesses shall be summoned by order of the appellate court as provided in the preceding section.

Sec. 664 (747). When court to order county to pay defendant's witnesses. 1879, c. 264, s. 4. 1881, c. 312, s. 1.

When the defendant shall be acquitted, a *nolle prosequi* entered, or judgment against him arrested, and it shall be made to appear to the court by certificate of counsel or otherwise, that said defendant had witnesses, duly subpoenaed, bound or recognized, in attend-

ance, and that they were necessary for his defence, it shall be the duty of the court, unless the prosecutor be adjudged to pay the costs, to make and file an order in the cause directing that said witnesses be paid by the county in such manner and to such extent as is authorized by law for the payment of state's witnesses in like cases.

COSTS CAN NOT BE TAXED AGAINST COUNTY WHEN INDICTMENT QUASHED.—The costs of witnesses "necessary" for the defendant can not be taxed against the county when the indictment is quashed. *Massey*, 104—377.

Sec. 665 (748). No witness entitled to his fees unless his name is included in the certificate of the solicitor or order of court. 1879, c. 264, 4. 1881, c. 321, s. 2.

No county prosecutor or defendant, shall be liable to pay any witness, nor shall his fees be embraced in the bill of costs to be made up as hereinbefore provided, unless his name be certified to the clerk by the solicitor, or included in the order of the court as required by the preceding section: *Provided*, that the court, at any time within one year after judgment, may order that any witness may be paid, who for any good reason satisfactory to the court failed to have his fees included in the original bill of costs.

Sec. 666 (746). Witnesses to be discharged by solicitor, who shall file a certificate of their attendance with the clerk. 1879, c. 264, s. 4. 1881, c. 312, s. 1.

It shall be the duty of all solicitors prosecuting in the several courts, as each criminal prosecution shall be disposed of by trial, removal, continuance or otherwise, to call and discharge the witnesses for the state, either finally or otherwise, as the disposition of the case may require, and he shall thereupon file with the clerk of the court a certificate giving the names of the witnesses entitled to prove their attendance, with the date of their discharge. The said certificate shall be in the following or similar form, and blanks thereof shall be furnished to the solicitor by the clerk at the county expense, viz.:

NORTH CAROLINA. } Court. Term, 18..
 COUNTY. } State vs.
 Witness

 discharged day of, 18...
 Solicitor.

Sec. 667 (1152). When prosecutor and witnesses shall be bound over. 1868-'9, c. 178, sub chap. 3, s. 21.

If it shall appear that an offence has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, the magistrate shall bind by recognizances the prosecutor and all

the material witnesses against such prisoner to appear and testify at the next term of the court having jurisdiction for the county in which the offence is alleged to have been committed.

Sec. 668 (1154). Witnesses may be required to give security for their appearance. 1868-'9, c. 178, sub chap. 3, s. 23.

Whenever such magistrate shall be satisfied by the proof that there is good reason to believe that any such witness will not fulfill the conditions of such recognizance unless security be required, he may order such witness to enter into a recognizance with such sureties as he shall deem meet for his appearance at such court.

Sec. 669 (1155). Witness not giving the security required may be committed to prison. 1868-'9, c. 178, sub chap. 3, s. 24.

If any witness so required to enter into a recognizance, either with or without sureties, shall refuse to comply with such order, it shall be the duty of such magistrate to commit him to prison until he shall comply with such order, or be otherwise discharged according to law.

Sec. 670 (3756). Compensation and mileage of witnesses. 1870-'1, c. 139, s. 13. 1883, c. 86.

The fees of witnesses, whether attending at a term of court or before the clerk, or a referee, or commissioner, or arbitrator, shall be one dollar per day. They shall also receive mileage, to be fixed by the county commissioners of their respective counties, at a rate not to exceed five cents per mile for every mile necessarily traveled from their respective homes in going to and returning from the place of examination by the ordinary route, and ferriage and toll paid in going and returning. If attending out of their counties, they shall receive one dollar per day and five cents per mile going and returning by the ordinary route, and toll and ferriage expenses: *Provided*, that witnesses before courts of justices of the peace, shall receive fifty cents per day in civil cases, and in criminal actions of which justices of the peace have final jurisdiction, witnesses attending the courts of justices of the peace, under subpœna, shall receive fifty cents per day; but the party cast shall not pay for more than two witnesses subpoenaed to prove any one material fact, and no prosecutor or complainant shall pay any costs, unless the justice shall find that the prosecution was malicious or frivolous: *Provided futher*, that experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order.

MILEAGE OF A WITNESS WHO REMOVES TO ANOTHER STATE.—A witness who removes to another state, after having been recognized or subpoenaed on the part of the state, is entitled to mileage from the place of his actual residence in the other state. The removal of such witness to another state can not discharge him from his obligation to appear at court and testify: Besides binding a witness in a recognizance or under subpoena to attend on a court can not have the effect to deprive him of the privilege of changing his place of residence. *Stewart*, 4 (Repos. and Term.), 138 (524).

NOTE.—As further elucidating the point decided in *Stewart's* case above, see *Stern v. Herrin*, 101—516, in which *Stewart's* case is cited and approved, and the distinction between the right of a non-resident witness to charge mileage in civil and criminal cases pointed out. The attendance of a non-resident witness in a civil case can not be enforced even though he is under subpoena, and, besides, his deposition may be taken; whereas in criminal cases the witness must be confronted with the accused, and they may be put under bonds to attend, and on failure to give recognizances when required by a magistrate they may be committed to prison. The Code, sections 1154, 1155.

Sec. 671 (733). When witnesses shall receive no pay. Bills of costs in criminal actions to be itemized and audited. 1873-'4, c. 116, s. 1. 1879, c. 264, s. 5.

It shall be the duty of the clerks of the several courts of record at each term of the court, to make up an itemized statement of the bill of costs in every criminal action tried or otherwise disposed of at said term, which shall be signed by the clerk, and approved by the solicitor. And the judge or justice may, in his discretion, for satisfactory cause appearing, direct that the witnesses, or any of them, shall receive no pay, or only a portion of the compensation authorized by law. And no county shall pay any such costs, unless the same shall have been approved, audited and adjudged against the county as herein provided. The clerk shall receive for every such bill of costs the sum of twenty-five cents, to be taxed as a part of said costs.

REFUSAL OF COURT TO ALLOW PAY NOT REVIEWABLE.—The action of the court in refusing to allow any compensation to witnesses is not reviewable. *Massey*, 104—877.

WRIT OF ERROR.

NO WRIT OF ERROR IN CRIMINAL CASES.—The writ of error in criminal cases does not obtain in this state, and a *certiorari* to bring up a case in which a prisoner has been properly convicted but illegally sentenced can not be treated as such. *Lawrence*, 81—522.

WRIT OF PROCEDENDO.

See PROCEDENDO.

WRIT OF PROHIBITION.

The writ of prohibition does not lie for grievances which may be redressed in the ordinary course of judicial proceedings by appeal, *recordari* or *certiorari*, and hence will not issue to prevent a mayor from proceeding to try a warrant for an alleged violation of a city ordinance. Whitaker, 114—818.

The writ of prohibition, being a prerogative writ, is to be used with great caution to prevent usurpation and secure regularity in judicial proceedings where none of the ordinary remedies provided by law give the desired relief, and damage and wrong will ensue pending their application. Whitaker, 114—818.

Instances in which the writ has been granted by courts in other states pointed out. Whitaker, 114—818.

Where a petition for a writ of prohibition is entertained the usual practice, unless prior notice of the petition has been given, is to issue a notice to the lower court to show cause why the writ should not issue and to stay proceedings in the meantime. Whitaker, 114—818.

The writ of prohibition which existed at common law and is authorized by article 4, section 8, of the constitution, can be issued only by the supreme court. Whitaker, 114—818.

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OF

STATUTES AND DECISIONS.

There are a great many decisions of such a character that they might very appropriately be cited under many different sections; but, in order to avoid such frequent repetitions of the same case, we have placed each case under the section which seemed to us to be most appropriate, and have then tried to so arrange the Index that each case may be easily found. The same may be said in regard to the Statutes. A great many of them contain matter which might very appropriately be placed under several different subjects, but of course such matter could not be separated, and so we have attempted to index the most important subject-matter in each section by giving the leading "catch-words" in it.

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